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No. 5272

~~1531~~

United States 1525

Circuit Court of Appeals

For the Ninth Circuit.

FRANCIS H. HARDY,

Appellant,

vs.

NORTH BUTTE MINING COMPANY, a Corporation,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5272

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NAMES AND ADDRESSES OF SOLICITORS OF RECORD.

EDWIN M. LAMB, Esq., Butte, Montana,

PATRICK E. GEAGAN, Esq., Butte, Montana,

WARREN E. GREENE, Esq., Duluth, Minnesota,

Messrs. CAREY & KERR, Portland, Oregon,

CHARLES A. HART, Esq., Portland, Oregon,
Solicitors for Plaintiff and Appellant.

CARL J. CHRISTIAN, Esq., Butte, Montana,
Solicitor for Defendant and Appellee. [1*]

In the District Court of the United States for the District of Montana.

FRANCIS H. HARDY,

Complainant,

against

NORTH BUTTE MINING COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 10th day of June, 1927, an order made by William B. Gilbert, Senior Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit, designating and appointing the Honorable John H. McNary, United States District Judge for the District of Oregon, to hold the District Court of the

*Page-number appearing at the foot of page of original certified Transcript of Record.

United States for the District of Montana, during the month of June, 1927, and to have and exercise within said District the same powers that are vested in the Judges thereof, was duly filed and entered herein and is in words and figures as follows, to wit: [2]

(Title of Court and Cause.)

ORDER DESIGNATING AND APPOINTING HONORABLE JOHN H. McNARY TO HOLD U. S. DISTRICT COURT FOR DISTRICT OF MONTANA DURING MONTH OF JUNE, 1927.

WHEREAS, in my judgment the public interest so requires, I hereby designate and appoint the Honorable John H. McNary, United States District Judge for the District of Oregon, to hold the District Court of the United States for the District of Montana, during the month of June, 1927, and to have and exercise within said District the same powers that are vested in the Judges thereof.

WITNESS my hand hereto this 7th day of June, 1927.

WM. B. GILBERT,
Senior Circuit Judge of the Ninth Circuit.

THEREAFTER, on June 10, 1927, certified copies of the bill of complaint, answer, consent to appointment of receivers, and order appointing receivers as filed and entered in the primary suit of Francis H. Hardy vs. North Butte Mining Company, in the United States District Court, District of Minnesota, was filed herein, and being in the words and figures as follows, to wit: [3]

In the United States District Court, District of Minnesota, Fifth Division.

FRANCIS H. HARDY,

Complainant,

against

NORTH BUTTE MINING COMPANY, a Corporation,

Defendant.

BILL OF COMPLAINT.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Minnesota:

Francis H. Hardy, a citizen of the State of Illinois, and a resident of Winnetka, County of Cook, State of Illinois, on his own behalf and on behalf of all creditors of North Butte Mining Company, and in behalf of all other parties in interest as shall be entitled to and shall elect or be authorized to join in this action, brings this, his bill of complaint, against North Butte Mining Company, a corporation duly organized and existing under

and by virtue of the laws of the State of Minnesota, a citizen and resident of the State of Minnesota, with its principal place of business in the City of Duluth, St. Louis County, Minnesota. [4]

And for his cause of action, the complainant alleges and states as follows:

1. That the complainant, Francis H. Hardy, is now, and for some time past has been, a citizen and a resident of the State of Illinois.

Upon information and belief, that the defendant, North Butte Mining Company, is now, and at all the times hereinafter mentioned, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and is now, and ever since its incorporation has been a citizen of the State of Minnesota, with its principal place of business in the City of Duluth, St. Louis County, Minnesota.

Upon information and belief, that ever since its said incorporation the defendant has been, and now is, duly admitted and licensed to own, hold, use and enjoy property and to transact business in the State of Montana.

2. That this suit is wholly between citizens of different states, as aforesaid, and that the matter and amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000) exclusive of interest and costs.

3. On information and belief, that the defendant was organized, among other things, to carry on the business of mining, smelting, reducing, refining or working of ores and other minerals and

the manufacture of iron, steel, copper and other metals, and to conduct any and all business incidental [5] or appurtenant to the foregoing, and with such other and further rights, powers and authority as are permitted by the laws of the State of Minnesota and provided in the certificate of incorporation of the defendant, duly filed and recorded in accordance with the laws of the said State of Minnesota, reference to which said certificate of incorporation and the recording thereof is hereby made for greater certainty.

4. On information and belief, that the defendant is now, and at all times hereinafter mentioned was, engaged in the aforesaid business in the states of Minnesota and Montana and elsewhere.

5. Upon information and belief, that the defendant is now and for more than one year last past has been, the owner in fee of certain valuable copper and zinc mines and mineral lands with certain equipment and personal property situated thereon, consisting of about 1,361 acres situate in Silver Bow County, Montana, which mines and mineral lands are commonly known as the North Butte and the Tuolumne mines and the East Side and the Main Range properties; that a part of said mines and properties, to wit: the Tuolumne Mine and the Main Range property were acquired in 1926 by purchase from the Tuolumne Copper Company, a Montana corporation, and the balance of the mines and properties have been owned by the defendant for many years prior thereto.

Upon information and belief, that with one or

more periods of cessation, the defendant has for many years [6] developed and worked the said North Butte Mine; that it has sunk shafts thereon, one known as Granite Mountain to a depth of 3,740 feet, one known as Speculator shaft to a depth of 2,800 feet and one known as Gem shaft to a depth of 2,200 feet. That on the said East Side properties which have been owned by defendant for many years last past, it has sunk a shaft known as Sarsfield shaft to a depth of 900 feet; that prior to the purchase by defendant of the other properties from Tuolumne Copper Company, as above set forth, the former owners thereof had sunk shafts thereon, one known as the Tuolumne shaft to a depth of 2,800 feet, one known as the Main Range shaft to a depth of 2,200 feet and one known as Colusa Leonard Extension shaft to a depth of 1,200 feet; that this defendant and its predecessors in interest have cut stations in said shafts, done drifting therefrom on said mining claims, made cross-cuts and upraises thereon and, in accordance with the usual methods of mining, have carried on underground in said mines and properties extensive development work and that as a result thereof have discovered and opened up ground containing valuable copper and zinc bearing ores; that in acquiring and developing said mines and properties, the defendant and its predecessors in interest have expended several million dollars; that for many years the defendant was engaged in active mining on a part of said mining claims and realized large returns and

profits therefrom; that for several years last past the defendant and said predecessors [7] in interest were engaged in active mining on other parts of said mining claims and realized some return therefrom; that during the last year and continuously from August, 1926, the defendant has been engaged in active mining operations on part of said properties known as the North Butte Mine, by means of what are commonly known and termed as leasing operations and by such means have been mining and producing ores containing copper, zinc and silver and receiving returns therefrom; that as a result of such operations the defendant has been and now is producing in the neighborhood of 3,700 tons of copper and zinc ores per month and that whether or not such operations are profitable depends largely upon the extent of such operations and the prices in the market of copper and zinc and that at the present time with the low prices of copper and zinc in the markets such operations are being conducted at a loss.

And on information and belief, that there are considerable reserves of copper and zinc ores in the North Butte Mine available for working by such leasing or other operations in the customary course of conducting the same; that said North Butte mine is fully equipped and is now in good working order and condition and from the development work therein with such equipment the defendant is in position to mine and produce upwards of 3,700 tons monthly of ores carrying copper and zinc profitably when the prices for cop-

per and zinc metals in the market are not less than 13½ cents per pound [8] for copper and 7 cents per pound for zinc and that the aforesaid leasing operations have been and are being conducted on the North Butte Mine and by means of the Granite Mountain and Speculator shafts.

And on information and belief, that the Main Range properties are partially developed and have ample equipment except pumping capacity for carrying on development and mining operations in said properties but that before such development and mining operations can be conducted in said Main Range properties further exploratory and development work will need to be done and additional pumping capacity provided, and that since on or about February 18, 1926, the defendant has expended large sums of money in pumping water from said Main Range properties through said Main Range shaft and in keeping said shaft open for anticipated future development and mining operations upon said Main Range properties.

Upon information and belief, that the aggregate value of the said mines, mining claims and mining property, including all said equipment, machinery and appliances owned by said defendant is at least $8,500,000.00 and that said value is greatly in excess of all the debts and obligations of the defendant.

6. Upon information and belief, that the defendant also owns certain other personal property situate in the City of Butte, State of Montana, including cash in banks and accounts receivable, ag-

gregating in value to the extent of but [9] not exceeding $50,000, and that the defendant also owns certain other personal property situate in the City of Duluth, State of Minnesota, consisting largely of shares of the capital stock of other corporations and which property is of the value of but not exceeding $100,000.

7. Upon information and belief, that the defendant at the time of the purchase of the properties of the Tuolumne Copper Company as hereinabove set forth, assumed and agreed to pay certain bonded indebtedness of said Company, to wit:

(a) Indebtedness under that certain deed of trust dated March 1, 1920, from Tuolumne Copper Mining Company, an Arizona corporation, the predecessor of Tuolumne Copper Company, to John E. Stephenson, of Butte, Montana, as Trustee, which was recorded on said date at page 511, in Book 61 of the Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which deed of trust was given to secure an issue of First Mortgage Five Year Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum from March 1, 1920, in the aggregate amount of $500,000.00, of which bonds there are now outstanding approximately $115,000.00 par value thereof; that said indebtedness is a first lien upon the properties acquired by the defendant by purchase from the Tuolumne Copper Company, as aforesaid, and the principal thereon is wholly past due and remains unpaid.

(b) Indebtedness under that certain deed of trust [10] dated April 16, 1923, from said Tuolumne Copper Mining Company to John S. Stephenson, Trustee, which was duly recorded on April 18, 1923, at page 571 of Book 69 of the Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, to secure an issue of Ten Year Mortgage Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum from April 17, 1923, in the aggregate amount of $750,000.00, of which bonds at the time of such purchase, there were and now are outstanding $2,200.00 par value thereof.

(c) Indebtedness under that certain deed of trust dated January 7, 1924, from Tuolumne Copper Company to J. K. Heslett, of Butte, Montana, as Trustee, to secure an issue of Ten Year Mortgage Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum, having an aggregate par value of $750,000.00, the lien of which latter deed of trust is subject to the liens of the deeds of trust of March 1, 1920, and April 16, 1923, above mentioned, and under which deed of trust of January 7, 1924, there were at the time of such purchase, bonds outstanding to the amount of $180,950.00 par value thereof. That since said purchase there have been retired of such outstanding bonds approximately $155,000.00 par value thereof and that there now remains outstanding of such bonds approximately $25,000.00 par value thereof; that the same consti-

tute an indebtedness in the amount of such outstanding bonds in addition to the indebtedness due under the deeds of trust [11] of March 1, 1920, and April 16, 1923; that the indebtedness under the foregoing deeds of trust constitutes liens upon all those properties of the defendant formerly owned by the Tuolumne Copper Company prior to the lien of the mortgages or deeds of trust next hereinafter described.

On information and belief, that the defendant heretofore duly made, executed and delivered a certain indenture of first mortgage to Central Union Trust Company of New York, as Trustee, dated January 2, 1926, and thereafter under date of January 2, 1927, made, executed and delivered a supplemental deed of trust to Central Union Trust Company of New York, as Trustee, which latter deed of trust was supplemental to the first mortgage dated January 2, 1926, and which said mortgage and supplemental deed of trust covered all the plant, mining property and equipment owned by the defendant in said Silver Bow County, Montana, subject to the deeds of trust as to the properties formerly owned by said Tuolumne Copper Mining Company and said Tuolumne Copper Company as above set forth; that said mortgage and supplemental deed of trust were given to secure certain first mortgage convertible sinking fund bonds, with interest payable semi-annually at the rate of 7 per cent per annum from January 2, 1926, which bonds are

due January 2, 1936, in the aggregate amount of $1,500,000.00, and of which bonds there have been duly issued, certified and are now outstanding approximately $364,000.00 par value thereof, which said mortgage was duly recorded July 14, 1926, [12] at page 446 in Book 75 of Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which supplemental deed of trust was duly recorded on January 25, 1927, on page 156 of Book 76 of Mortgage Records of Silver Bow County, Montana, and to which reference is hereby made for greater certainty.

Upon information and belief, that the defendant is indebted for wages of employees, mining expenses, equipment, mining and supplies, stamping and smelting charges and other miscellaneous charges and expenses and accounts in the aggregate amount of approximately $76,000.00, all of which indebtedness is past due and owing by the defendant to divers persons, partnerships and corporations, and that demand for the payment of which in full or in part has been and is being frequently made.

Upon information and belief, that the defendant has promissory notes outstanding due various banks and individuals aggregating approximately $75,000.00, a part of which are secured by its mortgage bonds and a part of which are unsecured, and a part of which indebtedness is now past due and the balance of which will shortly mature.

Upon information and belief, that the defendant paid the interest due under the several deeds of trust, mortgages and supplemental deed of trust above mentioned on the dates when the same were last due, but that defendant has no cash or available quick assets with which to pay either the [13] principal which is past due under the deed of trust of March 1, 1920, or the interest due under said deed of trust maturing September 1, 1927, or the interest due under the deed of trust of April 16, 1923, maturing October 16, 1927, or the interest under the deed of trust of January 7, 1924, maturing July 7, 1927, or the interest under the said mortgage or deed of trust of January 2, 1926, and the said supplemental mortgage or deed of trust of January 2, 1927, maturing July 1, 1927.

8. That on or about March 1, 1927, the defendant duly made, executed and delivered to this complainant, for a valuable consideration, its promissory note wherein and whereby the defendant promised to pay to the complainant on or before June 1, 1927, the sum of $6,500, together with interest thereon at the rate of 7 per cent per annum; that no part of said sum has been paid although past due, and demand has been made upon the defendant by the complainant; that there is now due and owing on said note from the defendant to the complainant the sum of $6,500, together with interest thereon at the rate of 7 per cent per annum from March 1, 1927.

9. Upon information and belief, that the defendant is at the present time without funds suffi-

cient to meet its obligations past due or shortly to mature and is unable to borrow the money necessary for such purposes; that it has used its best endeavors to sell the unsold mortgage bonds secured by said mortgage of January 2, 1926, but that its efforts in that direction have been wholly unsuccessful; [14] that many of said creditors are pressing for the payment of their debts, threatening suits and other proceedings; that employed at said mines at present are upwards of fifty employees; that defendant has no funds with which to pay said employees their current monthly wages and there are at least fifty creditors of the defendant each having claims of less than $500.00.

10. Upon information and belief, that all the authorized capital stock of the defendant consists of 1,000,000 shares of common stock of the par value of $10.00; that there are issued and outstanding of such stock 640,000 shares, which shares are owned by approximately 6,000 stockholders.

11. Upon information and belief, that the inability of the defendant to meet its obligations, as hereinbefore alleged, is caused by its inability to sell more of said mortgage bonds, as aforesaid, or to raise moneys by any other method of refinancing, and with the funds therefrom to bring into production its East Side and Main Range properties.

12. Upon information and belief, that various creditors are pressing the defendant for the payment of their claims as aforesaid, and unless the assets of the defendant are taken into judicial

custody, actions at law may be instituted by said creditors, and through said actions said creditors may obtain judgment and executions, and inequitable preferences as against your complainant and other creditors may result. Moreover, through such actions and executions and possible sales under execution, irreparable injury will [15] be done this complainant and other creditors of the defendant, besides the stockholders thereof, and the goodwill of the defendant's business will be lost, its ability eventually to proceed with the mining and operations of its said mining properties will be destroyed and the value of its said properties and assets will be irreparably impaired.

13. That the complainant has no adequate remedy at law.

14. That in order to avoid the contingencies above referred to and to preserve the business and assets of the defendant and permit of the continuance of said business until sufficient funds can be obtained out of its assets by operation of its mines or by reorganization of the defendant to provide for the payment of the liabilities, it will be necessary that the assets of the defendant be taken into judicial custody and administered by a court of equity and that all actions and proceedings in law, including executions, attachments and other processes be enjoined; that in this way the property of the defendant can be protected and the rights of the complainant and other creditors equitably adjudicated.

WHEREFORE, for all these purposes and for the equal protection of the rights not only of your complainant and other holders of the promissory notes of the defendant but of all its creditors, including holders of bonds which will not fall due for some time to come, as well as for the protection of the stockholders of the defendant whose property is in [16] imminent danger of being wasted, the complainant alleges that the intervention of a court of equity is imperatively required and that a receiver or receivers should be appointed to take charge of all the assets of the defendant, wherever situate, and to conduct, manage, administer and, if advisable, carry on the business of the defendant and administer the assets thereof with all and singular the powers to be conferred upon him or them in the proposed decree herein submitted and until the final decree of the court in the premises.

15. Inasmuch as the complainant has no adequate remedy at law and can be relieved only in equity, the complainant files this bill of complaint in behalf of himself and of all other creditors of the defendant, and on behalf of all of the parties in interest as shall be entitled to and shall elect or be authorized to join in this action and prays for equitable relief as follows:

1. That a receiver or receivers be appointed to take charge of and manage the property and assets of the defendant of whatsoever kind and wheresoever situate.

2. That said receiver or receivers be authorized to take possession of the real and personal property of the defendant, its business, stocks of minerals and metals, machinery and equipment, stores, accounts and all the other assets of the defendant, and conduct the business of the defendant, if the same can be done profitably, operate said mines or any thereof, either by leasing operations or otherwise, [17] sell and dispose of the products thereof and the metals derived therefrom, purchase and install such new machinery and equipment and supplies, and employ such agents, servants and workmen as may be necessary from time to time for the conduct of said business and the operation of said mines or any thereof until the further order of this Court.

3. That said receiver or receivers be authorized to demand, sue for, collect, receive and take into possession all of the goods, chattels, rights, credits, moneys, effects, books, papers, choses in action and all other property whatsoever of the defendant, and to institute and prosecute suits in law or in equity for the recovery of any assets, property, damages or demands belonging to or existing in favor of the defendant, and settle and compound all debts or other claims whatsoever of the defendant as in the judgment of such receiver or receivers may be advisable.

4. That all persons, firms, and corporations be enjoined from levying execution upon, attaching, intermeddling with or taking possession of, any of the property of the defendant wherever situate.

5. That the officers, employees and servants of the defendant be enjoined from selling, transferring, disposing of or in any manner interfering with any of the property of the defendant or taking possession of the same or interfering with the said receiver or receivers in the performance of his or their duties. [18]

6. That the officers, agents and employees of the defendant be required forthwith to transfer, convey, assign and deliver unto the said receiver or receivers or his or their duly authorized agents or representatives all the property and assets of the defendant and to take such action as may be necessary thereto.

7. That all persons, firms and corporations be enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant or from levying or serving any attachments or executions or other processes upon the defendant or upon or against any of the property of the defendant, and generally that all persons, firms, or corporations be enjoined from doing any act to interfere with said receiver or receivers in his or their possession, use or disposition of the property of the defendant.

8. That a writ of injunction issue out of and under the seal of this Honorable Court or issue by one of your Honors directing, enjoining and restraining the defendant and its officers, directors, agents and employees and all other persons whomsoever from interfering with, transferring,

selling or disposing of any of the property of the defendant.

9. That this Honorable Court grant a writ of subpoena under the seal of said court directed to the defendant and commanding it on a day certain therein named before this [19] Honorable Court to answer (but not under oath, answer by oath being expressly waived) all and in the premises and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

10. That a decree appointing a receiver or receivers of the property of the defendant and granting the relief prayed for in this bill of complaint may be granted by this Honorable Court in the form herewith submitted.

11. That the complainant Francis H. Hardy have judgment against the defendant for the sum of $6,500.00, with interest at the rate of seven per cent per annum from and after the 1st day of March, 1927; and that the rights of the said complainant creditor upon said judgment, or under the indebtedness set out and alleged in this complaint, in connection with the rights of all other creditors, whether judgment creditors or general creditors, be established by an order and decree of this Honorable Court.

12. That at such time as may be found just and proper, the properties and assets of the said defendant may be ordered to be sold as an entirety, and in such manner and upon such terms and conditions as this Honorable Court shall deem just

and equitable, or in due course of business, if it be found just and equitable, to continue the business until the same can be so disposed of, and that any such order of sale or disposition of said property may make proper and suitable disposition for all credits, rights, priorities and [20] liens of the creditors of the defendant, and may and shall provide for a sale of the property of the defendant as an entirety, subject to and free and clear of all encumbrances, in such manner and upon such terms as this Honorable Court may direct, and that the proceeds of any such sale may be distributed amongst those entitled thereto, as this Honorable Court may adjudicate; and that the complainant may have such other, further and different relief in the premises as to this Honorable Court may seem proper or might be necessary to fully and properly enforce the rights and credits of this complainant, and all credits of the stockholders, and in case of the sale of any or all of the property of the defendant it may be directed to make, execute and deliver to the purchaser or purchasers, deeds of sale and conveyance as may be necessary and proper to vest in such purchaser or purchasers the title to all said property.

13. That upon the determination and adjustment of all the rights of the parties, and the sale and disposition of the property and assets of the defendant, and upon the payment either in full or *pro rata* of all its creditors, said defendant corporation be dissolved and its affairs finally wound up and the residue of its property, if any,

be distributed among its stockholders as they may severally be entitled thereto.

14. That such order shall be made by this Honorable Court as to the service of this bill of complaint or any [21] order that may be made in this suit as may be deemed sufficient and proper by this Court.

15. That the complainant have such other and further relief as the exigencies of the case may require and as to this Honorable Court may seem meet.

And your complainant will ever pray, etc.

FRANCIS H. HARDY,
Complainant.

WARREN E. GREENE,
Solicitor for Complainant,
800 Alworth Building,
Duluth, Minnesota.

State of Illinois,
County of Cook,—ss.

Francis H. Hardy, being duly sworn, deposes and says that he is the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 3d day of June, 1927.

HELEN M. JENNINGS,
Notary Public, Cook County, Illinois.

My commission expires May 15, 1927. [22]

[Endorsed]: Filed June 8, 1927. [23]

[Title of Court and Cause.]

ANSWER.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Minnesota:

Now comes the defendant, North Butte Mining Company, in the above-entitled cause, and submitting itself to the jurisdiction of this Court, for its answer to the bill of complaint herein, admits each and every of the allegations contained in said bill of complaint.

NORTH BUTTE MINING COMPANY,
By FREDERIC R. KENNEDY,
Secretary.

WILLIAM E. TRACY,
Solicitor for Said Defendant,
609 Alworth Building,
Duluth, Minnesota. [24]

State of Minnesota,
County of St. Louis,—ss.

Frederic R. Kennedy, being duly sworn, deposes and says that he is the secretary of North Butte Mining Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FREDERIC R. KENNEDY.

Subscribed and sworn to before me this 8th day of June, 1927.

GRACE OLSON,
Notary Public, St. Louis County, Minn.
My commission expires Oct. 17, 1928. [25]

[Endorsed]: Filed June 8, 1927. [26]

[Title of Court and Cause.]

CONSENT TO APPOINTMENT OF RECEIVERS.

Now comes the defendant in the above-entitled matter and hereby consents to the appointment by the above-entitled court in the above-entitled cause of John W. Neukom, of Duluth, St. Louis County, Minnesota, and Matt L. Essig, of Butte, Silver Bow County, Montana, as receivers of and for the said defendant, North Butte Mining Company, and all of its property and assets.

Dated at Duluth, Minnesota, this 8th day of June, A. D. 1927.

NORTH BUTTE MINING COMPANY.
By FREDERIC R. KENNEDY,
Its Secretary.

WILLIAM E. TRACY,
Solicitor for Defendant,
609 Alworth Building,
Duluth, Minnesota. [27]

State of Minnesota,
County of St. Louis,—ss.

Frederic R. Kennedy, being first duly sworn, deposes and says that he is the secretary of North Butte Mining Company, the defendant above named; that he has read the foregoing Consent and know the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as those matters he believes it to be true.

FREDERIC R. KENNEDY.

Subscribed and sworn to before me this 8th day of June, A. D. 1927.

GRACE OLSON,
Notary Public, St. Louis County, Minn.
My commission expires Oct. 17, 1928. [28]

[Endorsed]: Filed June 8, 1927. [29]

[Title of Court and Cause.]

ORDER APPOINTING RECEIVERS.

The above-entitled matter having come regularly on for hearing before the Honorable William A. Cant, Judge of said court, on the 8th day of June, 1927, and it appearing that heretobefore and on the 8th day of June, 1927, there was filed herein a bill of complaint duly verified by said complainant, praying for the reasons therein set forth, among other things, for a decree appointing a receiver or receivers to take charge of and manage the property, assets, effects, real, personal and mixed of the defendant of whatsoever kind, nature and description and wheresoever situate, pending the hearing and determination of this suit, and the complainant then and there appearing before the said Court by his solicitor, Warren E. Greene, Esquire, and the defendant appearing by William E. [30] Tracy, Esquire, and filing its answer herein admitting all the allegations of the said bill of complaint and its consent to the appointment of receivers herein as prayed in said bill, and it appearing to the Court that the appointment of a receiver or receivers of all the assets and property of said defendant is for the best interests of all concerned, on motion of said solicitor for the complainant, and the Court being fully advised in the premises:

1. NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the complainant is entitled to the relief prayed for and herein

granted, and that he has no adequate remedy save through the granting of this order and decree, and that it is necessary for the protection and preservation of the respective rights and equities of the parties, and all other creditors and stockholders of the defendant, that the property and business of the defendant be preserved and administered in this suit through a receiver or receivers to be appointed by this court, and that it is necessary that such receiver or receivers of the defendant and its property and assets, should be appointed forthwith, and with the powers herein granted, and all the powers pertaining to receivers in such cases; and

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that John W. Neukom, of Duluth, St. Louis County, Minnesota, and Matt. L. Essig, of Butte, Silver Bow County, Montana, be, and they hereby are, appointed receivers of the defendant, North [31] Butte Mining Company, and of all properties and assets owned, controlled, or in the possession of said defendant, whether such property be real, personal or mixed, of whatsoever kind and description, and wheresoever situated, including all buildings, premises, property and appurtenances, stocks of minerals and metals, machinery and equipment, owned, controlled, leased, or operated by the defendant, and all officers, furniture, fixtures, books of account, records, and other books and papers and accounts, cash on hand, or in bank, or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes, or bills receivable,

merchandise, stock in trade, debts, liens, contracts, muniments of title, rents, issues, profits accruing or to accrue, from or out of any of the properties of the defendant, as well as interest, easements, privileges, franchises, assets and property of every character or description whatsoever of the defendant; and

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said receivers be, and they hereby are, authorized forthwith to take and to have, until the further order of this Court, complete and exclusive control, possession and custody of all the assets and property of the defendant, and all persons, firms and corporations, including the defendant, their officers, agents and servants, shall forthwith deliver to said receivers properties of every nature and description, wheresoever situated, of the defendant; and

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that [32] the said receivers be, and they hereby are, authorized to manage, direct, control and preserve all and singular the property, assets and business of said defendant, subject at all times to the further orders and directions of this Court, and if said receivers shall find that they can continue the mining and leasing operations of said defendant profitably and without loss or damage to said estate, pending the final sale and disposition of said property, they are hereby authorized so to do, but subject always to the further order and control of this Court; and

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said receivers be, and they hereby are, authorized, in their discretion, to employ such managers, agents, employees, servants, accountants, attorneys and counsel, as may, in their judgment, be advisable or necessary in the management, conduct, control, or custody of the affairs of the defendant, and of the property and assets thereof, and that said receivers be, and they hereby are, authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets and properties of the defendant, including the authority to make payments of debts entitled to priority, and to borrow or otherwise secure money on receivers' certificates or otherwise upon express order of this Court; and

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said receivers be, and they hereby are, authorized to receive and collect all rents, incomes and profits of any of the [33] properties of the defendant, whether the same be now due or shall hereafter become due and payable, and that said receivers be, and they hereby are, authorized to do such things, enter into such agreements, employ such agents, in connection with the management, care and preservation of the properties of the defendant, as they may deem advisable, and are authorized to incur such expenses, make such disbursements, as may in their judgment, be advisable or necessary in connection with the care

and preservation and maintenance of the properties and assets of the defendant; and

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said receivers be, and they are hereby, authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in, or become a party to such suits, actions, proceedings at law or in equity, including ancillary proceedings, in state and federal courts, as may, in their judgment, be necessary or proper for the protection, maintenance and preservation of the property, assets and rights of the carrying out of the terms of this order and decree, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions and proceedings instituted against them, as receivers, or against the defendant, and also to appear in and conduct the prosecution or defense of any suit, or adjust or compromise, any actions or proceedings now pending in any court by or against the defendant, where such prosecution, defense, or other disposition of such suits, actions or [34] proceedings, will, in the judgment of said receivers, be advisable or proper for the protection of the property, assets or rights of the defendant, and said receivers shall be, and they hereby are, authorized, to settle, adjust, compromise, collect from, or make allowances to debtors of the defendant, to enter into such arrangements, compensations, extensions, or otherwise, with debtors of the defendant, as they, the said receivers, may deem advisable; and, generally, said receivers are authorized to do any and all acts, enter into any

and all agreements, and accept, adopt or abandon any and all contracts that may be deemed by such receivers advisable for the protection, maintenance, care or preservation of the property of the defendant.

8. It appearing to the Court in connection with the operation of said mines and properties, that defendant has entered into certain contracts and leases by which certain of said mines and properties are now being worked under so-called leasing operations, said receivers are authorized to continue such contracts and leases or terminate the same as they may deem advisable.

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said receivers may, from time to time, for the purpose of conserving said property and estate of said defendant, and the appointment of agents, servants, employees, attorneys and counsel, the payment of taxes, past due labor and material claims, which are statutory first and prior liens upon the property [35] of defendant, and for all purposes necessary and connected with the discharge of their duties as such receivers under this order, issue certificates of indebtedness, not exceeding $150,000.00 in amount, which shall be and constitute a first lien against all the property and effects of the defendant company, in amounts sufficient to procure the funds necessary; provided, however, that the amount of such receivers' certificates so to be issued under the authority hereby conferred, shall not exceed $25,000.00 without the further order of this Court, nor shall the same be sold at less than par.

10. That the defendant and each and every of its officers, directors, agents, servants and employees, and any and all persons claiming to act by, through or under or for the defendant, and all other persons, firms, and corporations, including creditors and stockholders of defendant and including all sheriffs, marshals, constables and their agents and deputies and all other officers and persons wherever situate, located or domiciled, be and the same severally hereby are, enjoined from transferring, removing, disposing of or attempting in *any to* remove, transfer or dispose of or in any way interfere with any of the properties and assets owned by or in the possession of the defendant, and all of said firms, persons and corporations are hereby severally and jointly enjoined from doing any act whatsoever to interfere with the possession, management and operation by said receivers of the mines and properties of defendant or with the possession by [36] said receivers of any assets of defendant or in any way to interfere with said receivers in the discharge of their duties or to interfere in any way with the administration and disposition in this suit of the affairs and properties of defendant, and all creditors and stockholders of defendant are severally and jointly enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity or under any statute against the defendant and from levying any attachments, executions or other process upon or against any of the properties of defendant, or from taking or attempt-

ing to take into its, his or their possession any of the properties of defendant, or from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment; and

11. That the defendant and each and every of its officers, agents, directors, servants, and employees be, and they severally hereby are, required and commanded forthwith to transfer, convey, turn over and deliver to the receivers or their duly constituted agents or representatives, all the real and personal property, business, assets and effects above described, or referred to, and all of the property and assets of defendant and all books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, shares of stock, certificates of stock, bonds, or other obligations, or other property, belonging to defendant, in its, his or their hands, or subject to its, his or their control. [37]

12. That said receivers give a bond herein in the sum of $25,000.00 conditioned that they will well and truly perform the duties of their office, and duly account for all moneys, property and assets which may come into their hands and abide by and perform all things which they shall be directed by the Court to do, with sufficient sureties, to be approved by a Judge of this court, and the said bond, when so approved, shall be filed with the Clerk of this court within ten days of the date of this order.

13. That said receivers be, and they hereby are, required to open proper books of account wherein shall be kept and stated the earnings, expenses,

rents and disbursements of their said trust and take and preserve proper vouchers for all payments made by them on account thereof.

14. IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that said receivers be, and they hereby are, directed within thirty (30) days from the date of this decree to cause to be mailed to each and every creditor of the defendant known to such receivers a copy of this order and of the bill of complaint, such mailing to be in a securely sealed envelope, postage prepaid, and to be addressed to the said creditor at the last postoffice address known to such receivers, and such service by mail is hereby decreed to be due, timely, sufficient and complete service of notice of this decree and this suit and all proceedings had or to be had herein upon all such creditors for all purposes; and [38]

15. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that all such creditors of the defendant except such creditors who reside or are located in the State of Montana, be, and they hereby are, directed to file with the receivers at such office or place of business as the receivers may designate and within ninety (90) days from the date of this order, a duly sworn statement of all or any such claims as such creditors may have or assert against the said defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the state where said claim is verified and such statement of claim shall, where the same is evidenced

by any written instrument, have such instrument or a copy thereof attached thereto; and

16. IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that notice of the time and place of the filing of said claim shall be published at least four times before the expiration of the said period of ninety(90)days in the "Duluth Herald," a daily newspaper printed, published and circulated in the City of Duluth and State of Minnesota; and

17. IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED, that all such creditors as shall fail to file their claims with the receivers and within the time herein fixed or within such further time as may be allowed by the court shall be debarred from any share of, in or to the properties of said defendant and shall not be entitled to receive any share thereof or of the proceeds thereof. [39]

18. That said receivers shall have leave to apply to the court for such other and further orders as may to them or their counsel from time to time seem advisable or necessary in the administration of this estate; and to apply to any other court to obtain jurisdiction for such order or orders in the premises as the complainant may deem necessary to carry out any of the orders issued by this court.

Dated at Duluth, Minnesota, this 8th day of June, A. D. 1927.

By the Court:
WM. A. CANT,
Judge of said Court. [40]

[Endorsed]: Filed June 8, 1927. [41]

United States of America,
District of Minnesota,
Fifth Division,—ss.

I, Joel M. Dickey, Clerk of the United States District Court for the District of Minnesota, do hereby certify that I have carefully compared each of the copies, attached to this certificate, with its respective original, which is in my custody as such Clerk, and that each of the said copies is a full, true, and correct transcript from such original and of the whole thereof and the endorsements thereon of bill of complaint, answer, consent to appointment of receivers and order appointing receivers.

IN TESTIMONY WHEREOF, I have hereunto set my official signature as the Clerk aforesaid and affixed the seal of said court at Duluth in the Fifth Division of said District this 8th day of June, A. D. 1927.

JOEL M. DICKEY,
Clerk.
By E. Catherine Neff,
Deputy Clerk. [42]

[Endorsed]: Filed June 10, 1927.

THEREAFTER, on June 10, 1927, ancillary bill of complaint was filed herein, which is in the words and figures as follows, to wit: [43]

In the United States District Court, District of Montana.

FRANCIS H. HARDY,

Complainant,

against

NORTH BUTTE MINING COMPANY, a Corporation,

Defendant.

ANCILLARY BILL OF COMPLAINT.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Montana:

Francis H. Hardy, a citizen of the State of Illinois, and a resident of Winnetka, County of Cook, State of Illinois, on his own behalf and on behalf of all creditors of North Butte Mining Company, and in behalf of all other parties in interest as shall be entitled to and shall elect or be authorized to join in this action, brings this, his ancillary bill of complaint, against North Butte Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, a citizen and a resident of the State of Minnesota, with its principal place of business in the City of Duluth, St. Louis County, Minnesota.

And for his cause of action, the complainant alleges and states as follows: [44]

1. That the complainant, Francis H. Hardy, is now, and for some time past has been, a citizen and a resident of the State of Illinois.

Upon information and belief, that the defendant, North Butte Mining Company, is now and at all the times hereinafter mentioned, has been a corporation duly organized and existing under and by virtue of the laws of Minnesota, and is now, and ever since its incorporation has been a citizen of the State of Minnesota, with its principal place of business in the City of Duluth, St. Louis County, Minnesota.

Upon information and belief, that ever since its said incorporation the defendant has been, and now is duly admitted and licensed to own, hold, use and enjoy property and to transact business in the State of Montana.

2. That this suit is wholly between citizens of different states, as aforesaid, and that the matter and amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000) exclusive of interest and costs.

3. On information and belief, that the defendant was organized, among other things, to carry on the business of mining, smelting, reducing, refining or working of ores and other minerals and the manufacture of iron, steel, copper and other metals, and to conduct any and all business incidental, or appurtenant to the foregoing, and with such other and further rights, powers and authority

as are permitted by the laws of the State of Minnesota and provided in the certificate of [45] incorporation of the defendant, duly filed and recorded in accordance with the laws of the said State of Minnesota, reference to which said certificate of incorporation and the recording thereof is hereby made for greater certainty.

4. On information and belief, that the defendant is now, and at all times hereinafter mentioned was, engaged in the aforesaid business in the States of Minnesota and Montana and elsewhere.

5. Upon information and belief, that the defendant is now and for more than one year last past has been, the owner in fee of certain valuable copper and zinc mines and mineral lands with certain equipment and personal property situated thereon, consisting of about 1,361 acres situate in Silver Bow County, Montana, which mines and mineral lands are commonly known as the North Butte and the Tuolumne mines and the East Side and the Main Range properties; that a part of said mines and properties, to wit: the Tuolumne Mine and the Main Range property, were acquired in 1926 by purchase from the Tuolumne Copper Company, a Montana corporation, and the balance of the mines and properties have been owned by the defendant for many years prior thereto.

Upon information and belief, that with one or more periods of cessation, the defendant has for many years developed and worked the said North Butte Mine; that it has sunk shafts thereon, one known as Granite Mountain to a depth of 3,740

feet, one known as Speculator shaft to a depth of 2,800 feet and one [46] known as Gem shaft to a depth of 2,200 feet. That on the said East Side properties which have been owned by defendant for many years last past, it has sunk a shaft known as Sarsfield shaft to a depth of 900 feet; that prior to the purchase by defendant of the other properties from Tuolumne Copper Company, as above set forth, the former owners thereof had sunk shafts thereon, one known as the Tuolumne shaft to a depth of 2,800 feet, one known as the Main Range shaft to a depth of 2,200 feet; and one known as Colusa Leonard Extension shaft to a depth of 1,200 feet; that this defendant and its predecessors in interest have cut stations in said shafts, done drifting therefrom on said mining claims, made cross-cuts and upraises thereon and, in accordance with the usual methods of mining, have carried on underground in said mines and properties extensive development work and that as a result thereof have discovered and opened up ground containing valuable copper and zinc bearing ores; that in acquiring and developing said mines and properties, the defendant and its predecessors in interest have expended several million dollars; that for many years the defendant was engaged in active mining on a part of said mining claims and realized large returns and profits therefrom; that for several years last past the defendant and said predecessors in interest were engaged in active mining on other parts of said min-

ing claims and realized some return therefrom; that during the last year and continuously from August, 1926, the defendant has been engaged in active mining operations on [47] part of said properties known as the North Butte Mine, by means of what are commonly known and termed as leasing operations and by such means have been mining and producing ores containing copper, zinc and silver and receiving returns therefrom; that as a result of such operations the defendant has been and now is producing in the neighborhood of 3,700 tons of copper and zinc ores per month and that whether or not such operations are profitable depends largely upon the extent of such operations and the prices in the market of copper and zinc and that at the present time with the low prices of copper and zinc in the markets such operations are being conducted at a loss.

And on information and belief, that there are considerable reserves of copper and zinc ores in the North Butte mine available for working by such leasing or other operations in the customary course of conducting the same; that said North Butte mine is fully equipped and is now in good working order and condition and from the development work therein with such equipment the defendant is in position to mine and produce upwards of 3,700 tons monthly of ores carrying copper and zinc profitably when the prices for copper and zinc metals in the market are not less than 13½ cents per pound for copper and 7 cents per pound for zinc and that the aforesaid leasing operations have

been and are being conducted on the North Butte Mine and by means of the Granite Mountain and Speculator shafts.

And on information and belief that the Main Range properties are partially developed and have ample equipment except pumping capacity for carrying on development and mining [48] operations in said properties but that before such development and mining operations can be conducted in said Main Range properties further exploratory and development work will need to be done and additional pumping capacity provided, and that since on or about February 18, 1926, the defendant has expended large sums of money in pumping water from said Main Range properties through said Main Range shaft and in keeping said shaft open for anticipated future development and mining operations upon said Main Range properties.

Upon information and belief, that the aggregate value of the said mines, mining claims and mining property, including all said equipment, machinery and appliances owned by said defendant is at least $8,500,000.00 and that said value is greatly in excess of all the debts and obligations of the defendant.

6. Upon information and belief, that the defendant also owns certain other personal property situate in the City of Butte, State of Montana, including cash in banks and accounts receivable, aggregating in value to the extent of but not exceeding $50,000 and that the defendant also owns certain other personal property situate in the City of Duluth, State of Minnesota, consisting largely

of shares of the capital stock of other corporations and which property is of the value of but not exceeding $100,000.

7. Upon information and belief, that the defendant at the time of the purchase of the properties of the Tuolumne Copper Company as hereinabove set forth, assumed and agreed to pay [49] certain bonded indebtedness of said Company, to wit:

(a) Indebtedness under that certain deed of trust dated March 1, 1920, from Tuolumne Copper Mining Company, an Arizona corporation, the predecessor of Tuolumne Copper Company, to John E. Stephenson, of Butte, Montana, as Trustee, which was recorded on said date at page 511, in Book 61 of the Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which deed of trust was given to secure an issue of First Mortgage Five Year Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum from March 1, 1920, in the aggregate amount of $500,000.00, of which bonds there are not outstanding approximately $115,000.00 par value thereof; that said indebtedness is a first lien upon the properties acquired by the defendant by purchase from the Tuolumne Copper Company, as aforesaid, and the principal thereon is wholly past due and remains unpaid.

(b) Indebtedness under that certain deed of trust dated April 16, 1923, from said Tuolumne Copper Mining Company to John E. Stephenson,

Trustee, which was duly recorded on April 18, 1923, at page 571 of Book 69 of the Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, to secure an issue of Ten Year Mortgage Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum from April 17, 1923, in the aggregate amount of $750,000.00, of which [50] bonds at the time of such purchase, there were and now are outstanding $2,200.00 par value thereof.

(c) Indebtedness under that certain deed of trust dated January 7, 1924, from Tuolumne Copper Company to J. K. Heslett, of Butte, Montana, as Trustee, to secure an issue of Ten Year Mortgage Convertible Gold Bonds, with interest payable semi-annually at the rate of 7 per cent per annum, having an aggregate par value of $750,000.00, the lien of which latter deed of trust is subject to the liens of the deeds of trust of March 1, 1920, and April 16, 1923, above mentioned, and under which deed of trust of January 7, 1924, there were at the time of such purchase, bonds outstanding to the amount of $180,950.00 par value thereof. That since said purchase there have been retired of such outstanding bonds approximately $155,000.00 par value thereof and that there now remains outstanding of such bonds approximately $25,000.00 par value thereof; that the same constitute an indebtedness in the amount of such outstanding bonds in addition to the indebtedness due under the deeds of trust of March 1, 1920, and April 16, 1923; that the indebted-

ness under the foregoing deeds of trust constitutes liens upon all those properties of the defendant formerly owned by the Tuolumne Copper Company prior to the lien of the mortgages or deeds of trust next hereinafter described.

On information and belief, that the defendant heretofore duly made, executed and delivered a certain indenture of first mortgage to Central Union Trust Company of New York, as Trustee, dated January 2, 1926, and thereafter under date of January 2, [51] 1927, made, executed and delivered a supplemental deed of trust to Central Union Trust Company of New York, as Trustee, which latter deed of trust was supplemental to the first mortgage dated January 2, 1926, and which said mortgage and supplemental deed of trust covered all the plant, mining property and equipment owned by the defendant in said Silver Bow County, Montana, subject to the deeds of trust as to the properties formerly owned by said Tuolumne Copper Mining Company and said Tuolumne Copper Company as above set forth; that said mortgage and supplemental deed of trust were given to secure certain first mortgage convertible sinking fund bonds with interest payable semi-annually at the rate of 7 per cent per annum from January 2, 1926, which bonds are due January 2, 1936, in the aggregate amount of $1,500,000.00, and of which bonds there have been duly issued, certified and are now outstanding approximately $364,000.00 par value thereof, which said mortgage was duly recorded July 14, 1926, at page 446 in Book 75 of Mortgage

Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which supplemental deed of trust was duly recorded on January 25, 1927, on page 156 of Book 76 of Mortgage Records of Silver Bow County, Montana, and to which reference is hereby made for greater certainty.

Upon information and belief, that the defendant is indebted for wages of employees, mining expenses, equipment, mining and supplies, stamping and smelting charges and other miscellaneous charges and expenses and accounts in the aggregate [52] amount of approximately $76,000.00, all of which indebtedness is past due and owing by the defendant to divers persons, partnerships and corporations, and that demand for the payment of which in full or in part has been and is being frequently made.

Upon information and belief, that the defendant has promissory notes outstanding due various banks and individuals aggregating approximately $75,000.00, a part of which are secured by its first mortgage bonds and a part of which are unsecured, and a part of which indebtedness is now past due and the balance of which will shortly mature.

Upon information and belief, that the defendant paid the interest due under the several deeds of trust, mortgages and supplemental deed of trust above mentioned on the dates when the same were last due, but that defendant has no cash or available quick assets with which to pay either the principal which is past due under the deed of trust of March

1, 1920, or the interest due under said deed of trust maturing September 1, 1927, or the interest due under the deed of trust of April 16, 1923, maturing October 16, 1927, or the interest under the deed of trust of January 7, 1924, maturing July 7, 1927, or the interest under the said deed of trust of January 2, 1926, and the said supplemental mortgage or deed of trust of January 2, 1927, maturing July 1, 1927.

8. That on or about March 1, 1927, the defendant duly made, executed and delivered to this complainant, for a valuable [53] consideration, its promissory note wherein and whereby the defendant promised to pay to the complainant on or before June 1, 1927, the sum of $6,500, together with interest thereon at the rate of 7 per cent per annum; that no part of said sum has been paid although past due and demand has been made upon the defendant by the complainant; that there is now due and owing on said note from the defendant to the complainant the sum of $6,500, together with interest thereon at the rate of 7 per cent per annum from March 1, 1927.

9. Upon information and belief, that the defendant is at the present time without funds sufficient to meet its obligations past due or shortly to mature and is unable to borrow the money necessary for such purposes; that it has used its best endeavors to sell the unsold mortgage bonds secured by said mortgage of January 2, 1926, but that its efforts in that direction have been wholly unsuccessful; that many of said creditors are press-

ing for the payment of their debts, threatening suits and other proceedings; that employed at said mines at present are upwards of fifty employees; that defendant has no funds with which to pay said employees their current monthly wages and there are at least fifty creditors of the defendant each having claims of less than $500.00.

10. Upon information and belief, that all the authorized capital stock of the defendant consists of 1,000,000 shares of common stock of the par value of $10.00; that there are issued and outstand- of such stock 640,000 shares, which [54] shares are owned by approximately 6,000 stockholders.

11. Upon information and belief, that the inability of the defendant to meet its obligations, as hereinbefore alleged is caused by its inability to sell more of said mortgage bonds, as aforesaid, or to raise moneys by any other method of refinancing, and with the funds therefrom to bring into production its East Side and Main Range properties.

12. Upon information and belief, that various creditors are pressing the defendant for the payment of their claims, as aforesaid, and unless the assets of the defendant are taken into judicial custody, actions at law may be instituted by said creditors, and through said actions said creditors may obtain judgments and executions, and inequitable preferences as against your complainant and other creditors may result. Moreover, through such actions and executions and possible sales under execution, irreparable injury will be done this complainant and other creditors of the defend-

ant, besides the stockholders thereof, and the good will of the defendant's business will be lost, its ability eventually to proceed with the mining and operation of its said mining properties will be destroyed and the value of its said properties and assets will be irreparably impaired.

13. That the complainant has no adequate remedy at law.

14. That in order to avoid the contingencies above referred to and to preserve the business and assets of the defendant and permit of the continuance of said business until sufficient funds can be obtained out of its assets by operation [55] of its mines or by a reorganization of the defendant to provide for the payment of the liabilities, it will be necessary that the assets of the defendant be taken into judicial custody and administered by a court of equity and that all actions and proceedings in law, including executions, attachments and other processes be enjoined; that in this way the property of the defendant can be protected and the rights of the complainant and other creditors equitably adjudicated.

WHEREFORE, for all these purposes and for the equal protection of the rights not only of your complainant and other holders of the promissory notes of the defendant but of all its creditors, including holders of bonds which will not fall due for some time to come, as well as for the protection of the stockholders of the defendant whose property is in imminent danger of being wasted, the complainant alleges that the intervention of a court

of equity is imperatively required and that a receiver or receivers should be appointed to take charge of all the assets of the defendant, wherever situate, and to conduct, manage, administer and, if advisable, carry on the business of the defendant and administer the assets thereof with all and singular the powers to be conferred upon him or them in the proposed decree herein submitted and until the final decree of the Court in the premises.

15. The complainant further alleges than on the 8th day of June, 1927, he commenced in the District Court of the United States for the District of Minnesota, Fifth Division, a Court [56] of record having jurisdiction of the parties and of the subject matter, a suit in equity wherein he was and is the camplainant and said North Butte Mining Company was and is the defendant and wherein in and by the complaint therein substantially the same allegations were made as are made in and by this Ancillary bill of complaint, and wherein this complaint as such complainant prayed that a receiver or receivers be appointed in said suit in the District Court of the United States for the District of Minnesota, Fifth Division thereof; that thereafter, to wit, on the said 8th day of June, 1927, in said primary or original receivership suit so pending in said United States District Court for the District of Minnesota, Fifth Division, an order was made by the Hon. William A. Cant, District Judge, appointing John W. Neukom of Duluth, Minnesota, and Matt L. Essig of Butte, Montana, as Receivers of said North Butte Mining Company.

A copy of said bill of complaint and a copy of said order in said suit are hereto attached, marked Exhibit "A" and Exhibit "B," respectively, and made a part hereof, and certified copies thereof and of the answer and consent of the defendant therein are filed herewith.

The complainant further alleges that from the nature of the business of the defendant and the necessity of intelligent mutual co-operation in said States of Minnesota and Montana in the administration of said receivership, it is desirable that the same receivers, if possible, shall be appointed and act in each jurisdiction. [57]

16. Inasmuch as the complainant has no adequate remedy at law and can be relieved only in equity, the complainant files this bill of complaint in behalf of himself and of all other creditors of the defendant, and on behalf of all of the parties in interest as shall be entitled to and shall elect or be authorized to join in this action and prays for equitable relief as follows:

1. That a receiver or receivers be appointed to take charge of and manage the property and assets of the defendant, and that the Court forthwith confirm the appointment heretofore made by said United States District Court of Minnesota, Fifth Division, of John W. Neukom and Matt L. Essig as receivers of all and singular the property of said North Butte Mining Company.

2. That said receiver or receivers be authorized to take possession of the real and personal property of the defendant, its business, stocks of minerals

and metals, machinery and equipment, stores, accounts and all the other assets of the defendant, and conduct the business of the defendant, if the same can be done profitably, operate said mines or any thereof, either by leasing operations or otherwise, sell and dispose of the products thereof and the metals derived therefrom, purchase and install such new machinery and equipment and supplies, and employ such agents, servants and workmen as may be necessary from time to time for the conduct of said business and the operation of said mines or any thereof until the further order of this Court. [58]

3. That said receiver or receivers be authorized to demand, sue for, collect, receive and take into possession all of the goods, chattels, rights, credits, moneys, effects, books, papers, choses in action and all other property whatsoever of the defendant, and to institute and prosecute suits in law or in equity for the recovery of any assets, property, damages or demands belonging to or existing in favor of the defendant, and settle and compound all debts or other claims whatsoever of the defendant as in the judgment of such receiver or receivers may be advisable.

4. That all persons, firms and corporations be enjoined from levying execution upon, attaching, intermeddling with or taking possession of, any of the property of the defendant wherever situate.

5. That the officers, employees and servants of the defendant be enjoined from selling, transferring, disposing of or in any manner interfering

with any of the property of the defendant or taking possession of the same or interfering with the said receiver or receivers in the performance of his or their duties.

6. That the officers, agents and employees of the defendant be required forthwith to transfer, convey, assign and deliver unto the said receiver or receivers or his or their duly authorized agents or representatives all the property and assets of the defendant and to take such action as may be necessary thereto. [59]

7. That all persons, firms and corporations be enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant or from levying or serving any attachments, or executions or other processes upon the defendant or upon or against any of the property of the defendant, and generally that all persons, firms or corporations be enjoined from doing any act to interfere with said receiver or receivers in his or their possession, use or disposition of the property of the defendant.

8. That a writ of injunction issue out of and under the seal of this Honorable Court or issue by one of your Honors directing, enjoining and restraining the defendant and its officers, directors, agents and employees and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property of the defendant.

9. That this Honorable Court grant a writ of

subpoena under the seal of said court directed to the defendant and commanding it on a day certain therein named before this Honorable Court to answer (but not under oath, answer by oath being expressly waived) all and in the premises and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

10. That a decree appointing a receiver or receivers *or* the property of the defendant and granting the relief prayed for in this ancillary bill of complaint may be granted by this [60] Honorable Court in the form herewith submitted.

11. That the complainant Francis H. Hardy have judgment against the defendant for the sum of $6,500.00, with interest at the rate of seven per cent per annum from and after the 1st day of March, 1927; and that the rights of the said complainant creditor upon said judgment, or under the indebtedness set out and alleged in this complaint, in connection with the rights of all other creditors, whether judgment creditors or general creditors, be established by an order and decree of this Honorable Court.

12. That at such time as may be found just and proper, the properties and assets of the said defendant may be ordered to be sold as an entirety, and in such manner and upon such terms and conditions as this Honorable Court shall deem just and equitable, or in due course of business, if it be found just and equitable, to continue the business until the same can be so disposed of, and that any such order of sale or disposition of said property may make

proper and suitable disposition for all credits, rights, priorities and liens of the creditors of the defendant, and may and shall provide for a sale of the property of the defendants as an entirety, subject to and free and clear of all encumbrances, in such manner and upon such terms as this Honorable Court may direct, and that the proceeds of any such sale may be distributed amongst those entitled thereto, as this Honorable Court may adjudicate; and that the complainant may have such other, further and different relief [61] in the premises as to this Honorable Court may seem proper, or might be necessary to fully and properly enforce the rights and credits of this complainant, and all credits of the stockholders, and in case of the sale of any or all of the property of the defendant it may be directed to make, execute and deliver to the purchaser or purchasers, deeds of sale and conveyance as may be necessary and proper to vest in such purchaser or purchasers the title to all said property.

13. That upon the determination and adjustment of all the rights of the parties, and the sale and disposition of the property and assets of the defendant, and upon the payment either in full or *pro rata* of all its creditors, said defendant corporation be dissolved and its affairs finally wound up, and the residue of its property, if any, be distributed among its stockholders as they may severally be entitled thereto.

14. That such order shall be made by this Honorable Court as to the service of this bill of com-

plaint or any order that may be made in this suit as may be deemed sufficient and proper by this Court.

15. That the complainant have such other and further relief as the exigencies of the case may require and as to this Honorable Court may seem meet.

And your complainant will ever pray, etc.

FRANCIS H. HARDY,
Complainant. [62]
By WARREN E. GREENE,
800 Alworth Building,
Duluth, Minnesota.
and
EDWIN M. LAMB,
123 Pennsylvania Building,
Butte, Montana,
His Solicitors.

State of Montana,
County of Silver Bow,—ss.

Edwin M. Lamb, being first duly sworn, deposes and says that he is one of the solicitors for the complainant above named; that said complainant is a resident of the State of Illinois and is not within the State of Montana where this affiant resides; that he makes this verification for and on behalf of said complainant and as one of his solicitors; that he has read the foregoing ancillary bill of complaint and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information and belief.

EDWIN M. LAMB.

Subscribed and sworn to before me this 10th day of June, A. D. 1927.

J. M. CLAXTON,
Notary Public for State of Montana, Residing at _____.

My commission expires July 8, 1928. [63]

(Note: Exhibits "A" and "B," being copies of the bill of complaint and order in the primary suit of Francis H. Hardy vs. North Butte Mining Company, certified copies of which are incorporated in this record; reference is hereby made thereto.)

[Endorsed]: Filed June 10, 1927.

THEREAFTER, on June 10, 1927, answer was filed herein, which is in the words and figures as follows, to wit: [64]

(Title of Court and Cause.)

ANSWER TO ANCILLARY BILL OF COMPLAINT.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Montana:

Now comes the defendant, North Butte Mining Company, in the above-entitled cause, and submitting itself to the jurisdiction of this court, for its answer to the ancillary bill of complaint herein,

admits each and every of the allegations contained in the said ancillary bill of complaint.

NORTH BUTTE MINING COMPANY.
By FREDERIC R. KENNEDY,
Secretary.

CARL J. CHRISTIAN,
Solicitor for Said Defendant.

State of Montana,
County of Silver Bow,—ss.

Frederic R. Kennedy, being duly sworn, deposes and says that he is the secretary of North Butte Mining Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. [65]

FREDERIC R. KENNEDY.

Subscribed and sworn to before me this 10th day of June, 1927.

ROSCOE L. THOMAS,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires February 24th, 1929.

[Endorsed]: Filed June 10, 1927.

THEREAFTER, on June 10, 1927, hearing in said cause was had, which record of hearing is in the words and figures as follows, to wit: [66]

No. 509.

FRANCIS H. HARDY

vs.

NORTH BUTTE MINING CO.

HEARING.

Edwin M. Lamb, Esq., attorney for complainant, and Carl J. Christian, Esq., attorney for defendant, present in court. Thereupon, on motion of Mr. Lamb, Court ordered that Warren E. Greene, Esq., of Duluth, Minnesota, be admitted to practice for the purposes of this case and his name entered as associate counsel for complainant.

Thereupon the cause was presented to the Court by counsel for the respective parties, whereupon Court signed and ordered filed and entered the following written order appointing ancillary receivers herein.

Entered in open court this 10th day of June, 1927.

C. R. GARLOW,
Clerk.

THEREAFTER, on June 10, 1927, order appointing ancillary receivers was duly made and filed herein, which order is in words and figures as follows, to wit: [67]

(Title of Court and Cause.)

ORDER APPOINTING ANCILLARY RECEIVERS.

And now, on this 10th day of June, 1927, this cause came on to be heard on the ancillary bill of complaint duly filed herein and the answer of defendant herein this day likewise herein, upon motion of the complainant for the appointment of receivers, and after hearing counsel for the complainant, and upon due deliberation, it is hereby ORDERED, ADJUDGED AND DECREED by the Court that the complaint is upon the facts contained in said ancillary bill of complaint and upon said answer entitled to the relief herein granted; and

It is further hereby ORDERED, ADJUDGED AND DECREED that this Court take ancillary jurisdiction with the District Court of the United States for the District of Minnesota, Fifth Division, in the certain cause now pending in the said court, wherein said Francis H. Hardy is the complainant and said North Butte Mining Company is the defendant, and that John W. Neukom, of Duluth, Minnesota, and Matt L Essig, of Butte, Montana, be and they hereby are, appointed receivers, ancillary to the receivers in the State of Minnesota,

of the above-named defendant, and of all the property, assets and effects of the defendant, real, personal and mixed and of whatsoever kind and description situate or being in the State of Montana; and [68]

It is further hereby ORDERED, ADJUDGED AND DECREED by the Court that the order, a copy of which is annexed to and made a part of said ancillary bill of complaint, marked Exhibit "B," made by the District Court of the United States, for the District of Minnesota, Fifth Division, of date June 8, 1927, naming and appointing John W. Neukom and Matt L. Essig as receivers of the property of the defendant, with certain powers and under certain instructions therein contained, be, and the same hereby is, in all respects approved, ratified and confirmed; and

It is further hereby ORDERED, ADJUDGED AND DECREED by the Court that the complainant caused to be filed in this court certified copies of all orders of a general nature in any way affecting the said property situate within the jurisdiction of this court made by the Judges of the District Court of the United States for the District of Minnesota, Fifth Division, in said primary cause pending in said court for the information of this Court and of all persons who may be interested in said cause and that the Clerk of this court enter upon the minutes of this court the copy of said order of said District Court of the United States for the District of Minnesota, Fifth Divi-

sion, of date June 8, 1927, immediately following the entry of this order and decree; and

It is further hereby ORDERED, ADJUDGED AND DECREED by this Court that the said ancillary receivers give jointly and severally a bond herein in the sum of $75,000.00 conditioned [69] that they will well and truly perform the duties of their office and duly account for all moneys and properties which may come into their hands and abide by and perform all things which they shall be directed by the Court to do, with sufficient sureties, to be approved by a Judge of this court, and that said bond when so approved be filed in the office of the Clerk of this court within fifteen (15) days from the date of this order and decree; and

It is further ORDERED, ADJUDGED AND DECREED, that the said ancillary receivers be, and they hereby are authorized forthwith to take and to have, until the further order of this Court, complete and exclusive control, possession and custody of all the assets and property of the defendant, and all persons, firms and corporations, including the defendant, their officers, agents and servants, shall forthwith deliver to said receivers properties of every nature and description, wheresoever situate of the defendant; and

It is further ORDERED, ADJUDGED AND DECREED, that the ancillary receivers be, and they hereby are, authorized to manage, direct, control, and preserve all and singular the property, assets and business of said defendant, subject at all times to the further orders and directions of

this Court, and if said ancillary receivers shall find that they can continue the mining and leasing operations of said defendant profitably and without loss or damage to said estate, pending the final sale and disposition of said property, they are hereby authorized [70] so to do, but subject always to the further order and control of this Court; and

It is further ORDERED, ADJUDGED AND DECREED, that the ancillary receivers be, and they hereby are, authorized, in their discretion, to employ such managers, agents, employees, servants, accountants, attorneys and counsel, as may, in their judgment, be advisable or necessary in the management, conduct, control, or custody of the affairs of the defendant, and of the property and assets thereof, and that said ancillary receivers be, and they hereby are, authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets and properties of the defendant, including the authority to make payments of debts entitled to priority, and to borrow and otherwise secure money or receivers' certificates or otherwise upon express order of this Court; and

It is further ORDERED, ADJUDGED AND DECREED, that the said ancillary receivers be, and they hereby are, authorized to receive and collect all rents, incomes, and profits of any of the properties of the defendant, whether the same be now due or shall hereafter become due and payable, and that said ancillary receivers be, and they

hereby are, authorized to do such things, enter into such agreements, employ such agents, in connection with the management, care and preservation of the properties of the defendant, as they may deem advisable, and are authorized to incur such expenses and make such disbursements as may in their judgment be advisable or necessary in [71] connection with the care and preservation and maintenance of the properties and assets of the defendant; and

It is further ORDERED, ADJUDGED AND DECREED, that said ancillary receivers be, and they are hereby, authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in, or become a party to such suits, actions, proceedings at law or in equity, including ancillary proceedings, in state and federal courts, as may, in their judgment, be necessary or proper for the protection, maintenance and preservation of the property, assets and rights of the defendant or the carrying out of the terms of this order and decree, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions and proceedings instituted against them, as receivers, or against the defendant, and also to appear in and conduct the prosecution or defense of any suit, or adjust or compromise, any actions or proceedings now pending in any court by or against the defendant, where such prosecution, defense, or other disposition of such suits, actions or proceedings, will, in the judgment of said ancillary receivers, be advisable or proper for the

protection of the property, assets or rights of the defendant, and said ancillary receivers shall be, and they hereby are, authorized, to settle, adjust, compromise, collect from, or make allowances to debtors of the defendant, to enter into such arrangements, compensations, extensions, or otherwise, with debtors of the defendant, as they, the said ancillary receivers, may deem advisable; and generally, said ancillary receivers are [72] authorized to do any and all acts, enter into any and all agreements, and accept, adopt or abandon any and all contracts that may be deemed by such ancillary receivers advisable for the protection, maintenance, care or preservation of the property of the defendant.

It appearing to the Court in connection with the operation of said mines and properties, that defendant has entered into certain contracts and leases by which certain of said mines and properties are now being worked under so-called leasing operations, said receivers are authorized to continue such contracts and leases or terminate the same as they may deem advisable.

It is further ORDERED, ADJUDGED AND DECREED, that the said ancillary receivers may, from time to time, for the purpose of conserving said property and estate of said defendant, and the appointment of agents, servants, employees, attorneys and counsel, the payment of taxes, past due labor and material claims, which are statutory first and prior liens upon the property of defendant, and for all purposes necessary and

connected with the discharge of their duties as such ancillary receivers under this order, issue certificates of indebtedness, not exceeding $150,000 in amount, which shall be and constitute a first lien against all the property and effects of the defendant company, in amounts sufficient to procure the funds necessary; provided, however, that the amount of such receivers' certificates so to be issued under the authority hereby conferred, shall not exceed $25,000.00 without the further order [73] of this Court, nor shall the same be sold at less than par.

That the defendant and each and every of its officers, directors, agents, servants and employees, and any and all persons claiming to act by, through or under or for the defendant, and all other persons, firms, and corporations, including creditors and stockholders of defendant and including all sheriffs, marshals, constables and their agents and deputies and all other officers and persons wherever situate, located or domiciled, be and the same severally hereby are, enjoined from transferring, removing, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with any of the properties and assets owned by or in the possession of the defendant, and all of said firms, persons and corporations are hereby severally and jointly enjoined from doing any act whatsoever to interfere with the possession, management and operation by said receivers of the mines and properties of defendant or with the possession by said receivers of any assets of

defendant or in any way to interfere with said receivers in the discharge of their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of defendant, and all creditors and stockholders of defendant are severally and jointly enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity or under any statute against the defendant and from levying any attachments, executions or [74] other process upon or against any of the properties of defendant or from taking or attempting to take into its, his or their possession any of the properties of defendant, or from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment; and

That the defendant and each and every of its officers, agents, directors, servants, and employees be, and they severally hereby are, required and commanded forthwith to transfer, convey, turn over and deliver to said receivers or their duly constituted agents or representatives, all the real and personal property, business, assets and effects above described, or referred to, and all of the property and assets of defendant and all books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, shares of stock, certificates of stock, bonds or other obligations, or other property, belonging to defendant, in its, his or their hands, or subject to his, its or their control.

That said receivers be, and they hereby are, required to open proper books of account wherein shall be kept and stated the earnings, expenses, rents and disbursements of their said trust and take and preserve proper vouchers for all payments made by them on account thereof.

It is further hereby ORDERED, ADJUDGED AND DECREED, that said receivers be, and they hereby are, directed within thirty (30) days from the date of this decree to cause to be mailed to each and every creditor of the defendant known to said [75] receivers a copy of this order and of the bill of complaint, such mailing to be in a securely sealed envelope, postage prepaid, to be addressed to the said creditor at the last postoffice address known to said receivers, and such service by mail is hereby decreed to be due, timely sufficient and complete service of notice of this decree and this suit and all proceedings had or to be had herein upon all such creditors for all purposes; and

It is further ORDERED, ADJUDGED AND DECREED, that all such creditors of the defendant be, and they hereby are, directed to file with the ancillary receivers at such office or place of business as the ancillary receivers may designate and within ninety (90) days from the date of this order, a duly sworn statement of all or any such claims as such creditors may have or assert against the said defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the state where said claim is verified and such statement of claim shall, where the same is evi-

denced by any written instrument, have such written instrument or a copy thereof attached thereto; and

It is further hereby ORDERED, ADJUDGED AND DECREED, that notice of the time and place of the filing of said claim shall be published at least four times before the expiration of the said period of ninety (90) days in the "Duluth Herald," a legal newspaper duly printed, published and circulated in the City of Duluth, State of Minnesota, and also at least four times in the [76] "Butte Daily Post," a daily newspaper printed, published and circulated in the County of Silver Bow, in the State of Montana; and

It is further hereby ORDERED, ADJUDGED AND DECREED, that all such creditors as shall fail to file their claims with said receivers and within the time herein fixed, or within such further time as may be allowed by this Court, shall be debarred from any share of, in or to the properties of said defendant and shall not be entitled to receive any share thereof or of the proceeds thereof.

That said receivers shall have leave to apply to the court for such other and further orders as may to them or their counsel from time to time seem advisable or necessary in the administration of this estate;

Dated at Butte, Montana, June 10, 1927.

By the Court:

JOHN N. McNARY,

Judge of the District of Oregon, Sitting in the District of Montana.

[Endorsed]: Filed June 10, 1927. [77]

THEREAFTER, on June 10, 1927, bond of ancillary receivers was duly filed herein, which is in the words and figures as follows, to wit:

(Title of Court and Cause.)

BOND OF ANCILLARY RECEIVERS.

KNOW ALL MEN BY THESE PRESENTS, that John W. Neukom, of Duluth, Minnesota, and Matt L. Essig, of Butte, Montana, as principals, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, in the city of New York, State of New York, as surety, are held and firmly bound unto the United States of America in the sum of Seventy-five Thousand Dollars ($75,000.00), lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, the said John W. Neukom and Matt L. Essig bind themselves, their heirs, executors, and administrators, and said surety company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of June, 1927.

WHEREAS, by an order made by Hon. John H. McNary, United States District Judge, dated the 10th day of June, 1927, the said John W. Neukom and Matt L. Essig were appointed, with [78] the usual powers, ancillary receivers of the property of North Butte Mining Company, a Minnesota

corporation, and were authorized to enter upon the discharge of their duties as such receivers upon giving the bond by said order required.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said John W. Neukom and Matt L. Essig shall in all events well and truly perform the duties of their office and duly account for all moneys, property and assets which shall come into their hands as such ancillary receivers, and shall abide by and perform all things which they shall be directed by the Court to do, then this obligation to be void; otherwise to remain in full force and effect.

JOHN W. NEUKOM. (L. S.)
MATT L. ESSIG. (L. S.)
AMERICAN SURETY COMPANY OF NEW YORK.
By JOHN E. CORETTE,
Resident Vice-President.
Attest: C. P. CALLAHAN,
Resident Assistant Secretary.

United States of America,
District of Montana,
City of Butte,
County of Silver Bow,—ss.

On this 10th day of June, 1927, before me personally appeared the within named John W. Neukom, to me known, and known to me to be the individual described in and who executed [79] the within

bond, and he duly acknowledged to me that he executed the same.

CARL J. CHRISTIAN,
Notary Public for the State of Montana, Residing at Butte, Montana.
My commission expires March 14, 1928.

United States of America,
District of Montana,
City of Butte,
County of Silver Bow,—ss.

On this 10th day of June, 1927, before me personally appeared the within named Matt L. Essig, to me known and known to me to be the individual described in and who executed the within bond, and he duly acknowledged to me that he executed the same.

CARL J. CHRISTIAN,
Notary Public for the State of Montana, Residing at Butte, Montana.
My commission expires March 14, 1928.

United States of America,
District of Montana,
City of Butte,
County of Silver Bow,—ss.

On this 10th day of June, 1927, before me personally appeared John E. Corette, Resident Vice-President of the American Surety Company of New York, with whom I am personally acquainted, who being by me duly sworn said: That he resides in the City of Butte, Montana; that he is a Resident Vice-president of the American Surety Company

of New York, the corporation described in and which executed the within instrument; that he knew the corporate seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Trustees of said corporation, that he signed said instrument as Resident Vice-president of said company by like authority, and that the liabilities of the American Surety Company of New York do not exceed the assets as ascertained in the manner [80] provided in Section 3, Chapter 720 of the New York Session Laws of 1893. And the said John E. Corette further said that he was acquainted with C. P. Callahan and knew him to be a Resident Assistant Secretary of said corporation, that the signature of said C. P. Callahan was thereto subscribed by like order of the said Board of Trustees and in the presence of him the said Resident Vice-president.

CARL J. CHRISTIAN,

Notary Public for the State of Montana, Residing at Butte.

My commission expires March 14, 1928.

The within bond is hereby approved.

JOHN H. McNARY,

United States District Judge.

[Endorsed]: Filed June 10, 1927.

THEREAFTER, on June 10, 1927, acceptance and oath of receivers was filed herein, which is in the words and figures as follows, to wit: [81]

(Title of Court and Cause.)

ACCEPTANCE AND OATH OF RECEIVERS.

The undersigned, John W. Neukom and Matt L. Essig, having this day been appointed ancillary receivers of the defendant North Butte Mining Company in the above-entitled action, do hereby accept such appointment.

Dated at Butte, Montana, June 10, 1927.

JOHN W. NEUKOM.
MATT L. ESSIG.

United States of America,
District of Montana,
County of Silver Bow,—ss.

We, the undersigned, John W. Neukom and Matt L. Essig, having been appointed ancillary receivers of the North Butte Mining Company, do solemnly swear that we will faithfully perform the duties of that office and obey all orders of the court herein; so help us God.

JOHN W. NEUKOM.
MATT L. ESSIG.

Subscribed and sworn to before me this 10th day of June, A. D. 1927.

MARIE HARVEY,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires March 24, 1930.

[Endorsed]: Filed June 10, 1927. [82]

THEREAFTER, on June 20, 1927, preliminary report of receivers was filed herein, which is in the words and figures as follows, to wit:

(Title of Court and Cause.)

PRELIMINARY REPORT OF RECEIVERS.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Montana:

Now come John W. Neukom and Matt L. Essig, ancillary receivers appointed by the Court in the above-entitled cause, and make and file this their preliminary report, as such receivers, for the information of the Court; a more complete, detailed and itemized report will be made and filed whenever thereunto required by the Court. A duplicate of this report is also being filed in the District Court of the United States, in and for the District of Minnesota.

Mining Properties and Other Real Estate:

A detailed list of the mining claims and other real estate owned by the North Butte Mining Company, together with a description of the various mortgages which are liens upon different groups of said mining claims and property, is hereto attached, marked Exhibit "A" and made a part hereof.

As a matter of convenience and for future reference the mining claims and property of the Company, situate on Butte Hill, are herein referred

to as Butte Hill properties and the mining claims and properties situate on the east side of [83] the Butte District are referred to as the East Side properties.

Included in the Butte Hill properties are the Granite Mountain mine, Speculator mine, Tuolumne mine and Gem mine; and included in the East Side properties are the Main Range mine, the Colusa-Leonard Extension Mine, the Sarsfield and the Birtha mine.

Granite Mountain Mine, Plant and Equipment:

The Granite Mountain mine, plant and equipment consists of a three-compartment shaft to a depth of 3,740 feet, located on the Granite Mountain claim, steel head-frame, idler towers, Wellman-Seaver-Morgan double drum hoist, with Westinghouse 1800 H. P. motor; slide valve or steam auxiliary hoist to operate chippy compartment to 2,800 level; 75 H. P. electric hoist on 2,800 level to operate chippy compartment from 2,800 to 3,600 level; ore bins, with capacity of approximately 1,500 tons; steel and concrete main hoisting engine and transformer building; small auxiliary hoist building, brick and concrete lightning-arrester building; large combination blacksmith-shop, machine-shop, and rope-shop; large concrete and steel combination change house; warehouse and office building, equipped with 600 steel lockers, and miscellaneous small buildings and surface structures. This plant and equipment is in good condition and ready for operation. Leasing operations were carried on at the property from August, 1926, to

June 1, 1927. The shaft was at the time of the shut-down unwatered to the 3,200 level; no pumping is being done and water will come up to [84] 2,800 level, from which point arrangements have been made with Anaconda Copper Mining Company to take care of water.

Speculator Mine, Plant and Equipment:

The Speculator Mine, plant and equipment consists of a three-compartment shaft to a depth of 2,800 feet, located on the Speculator Claim; shaft is in poor condition and only center compartment at present being worked by leasers to 1,200 level; steel head-frame, large double drum Nordberg steam hoist; large single drum auxiliary steam or air hoist; ore bins of capacity of 800 tons; brick and steel hoist buildings; concrete transformer building; combination brick and metal clad compressor buildings, corrugated iron planing and saw-filing shop; wooden timber framing mill; brick warehouse and miscellaneous surface buildings and structures. Machinery and equipment is in good usable condition, but shaft is in such condition as to probably make impracticable its future use.

Tuolumne Mine, Plant and Equipment:

The Tuolumne mine, plant and equipment consists of shaft 2,600 feet in depth; large Nordberg double drum, compound steam hoist; steel head-frame; ore bins; steel hoist building, boiler-room, and miscellaneous surface buildings and structures. Plant has not been operated for some years, ex-

cept for short period late in 1926 when leasers operated one compartment of shaft with small geared air hoist. [85]

Gem Mine, Plant and Equipment:

Gem mine, plant and equipment consists of shaft 2,200 feet in depth; used as ventilating shaft; small wooden head-frame; ventilating fan and 75 H. P. motor; no hoist or other equipment; understand shaft is in fair condition.

Main Range Mine, Plant and Equipment:

Main Range mine, plant and equipment consists of shaft 2,200 feet in depth; wood head-frame; double drum electric hoist with 275 H. P. motor; hoist buildings; machine-shop recently constructed and fully equipped; blacksmith-shop; timber framing mill, transformer house; small office building; and miscellaneous surface structures. Shaft and equipment is in good operating condition; 10-inch water column was recently installed in shaft from surface to 1,200 level, and sufficient water column on hand to complete installation to 2,200 level; pumping operations ceased last April, and shaft is gradually filling with water, but are advised water will probably not reach 1,200 level. Last development work was done on 2,000 level several years ago; and to carry on further development work will necessitate installation of water column from 1,200 to 2,200 level, and purchase and installation of additional pumping equipment. Adjoining Main Range plant is Colusa-Leonard shaft to depth of 1,200 feet; wooden head-frame; one building and

some equipment; plant not used for some years and not in operating condition. [86]

Sarsfield Mine, Plant and Equipment:

Sarsfield mine, plant and equipment consists of two-compartment shaft 900 feet in depth; steel head-frame; 112 H. P. double drum electric hoist; 100 H. P. Ingersoll-Rand compressor; frame hoist building, and miscellaneous surface structures. Shaft under water and not used for some years; no pumping equipment at plant.

Birtha Mine:

Shaft approximately 100 feet in depth; no equipment; recently operated in small way by leasers.

Mining Machinery, Equipment, Materials and Supplies:

An inventory and list of the mining machinery, equipment, materials and supplies found at the property is attached hereto, marked Exhibit "B" and made a part hereof. Such inventory was made by and under the supervision of the receivers, and while not complete to the last detail, we believe covers substantially all the mining machinery, equipment materials and suppiles on hand, usable or of value.

Stock in Other Companies:

The Company owns 1,962,353 shares, par value $1.00, out of a total of $2,010,000 shares of the issued and outstanding capital stock of the Butte Exemption Copper Company, a Maine corporation; and 194,008 shares, par value $5.00, out of a total of 198,-

000 shares of the issued and outstanding capital stock of the Amazon Butte Copper Company, a Montana corporation. [87] The certificates of said stock are in the possession of the receivers in the State of of Minnesota. The above-named companies own certain mining claims and interests in mining claims on the East Side of the Butte District, all of which are listed and described in Exhibit "A" hereinbefore referred to.

Current Assets and Liabilities:

Cash on hand June 10, in the First National Bank of Butte, was $613.99. Attached hereto is detailed statement of Cash, Accounts Receivable, Bonds, Notes and Accounts Payable, which statement is marked Exhibit "C" and made a part hereof. A summary or recapitulation of Exhibit "C" is as follows:

Current Assets:

Cash	$ 613.99	
Accounts Receivable	26,082.59	
		$ 26,696.58

Liabilities:

Tuolumne Bonds — past due	$115,500.00	
Notes Payable—past due.	61,000.00	
Accounts Payable	79,471.46	
Outstanding checks	178.75	
	$256,150.21	$256,150.21

North Butte Bonds—not matured	364,100.00	
Tuolumne Bonds—not matured	2,200.00	
Tuolumne Bonds—not matured	25,450.00	
	391,750.00	391,750.00
Notes payable — not matured	15,000.00	15,000.00
		$662,900.21
In addition to the foregoing there will be interest maturing on July 1st on Tuolumne bonds outstanding (1924 issue) [88] amounting to		890.75
Interest on North Butte bonds maturing on July 2d, amounting to approximately		12,700.00
Notes payable maturing from June 23d, to July 3d		15,000.00

At the time of the appointment of the undersigned as receivers, the following officers and employees were on the pay-roll of the Company, at monthly rate listed:

Paul A. Gow, General Manager	$600.00
H. A. Fay, Assistant Manager	300.00
J. J. Harrington, Cashier	300.00
M. L. Essig, Chief Clerk	300.00
Agnes Duckham, Stenographer	90.00
F. C. Ball, Foreman-Watchman	250.00
Wm. Bruyn, Asst. Foreman-Watchman	225.00

C. M. Cross, Watchman	75.00
Tony Thomas, Watchman	40.00
John Collins, Watchman	50.00
George L. Lapp, Fire Chief	30.00
	$2,260.00

and Ben Favero, Watchman, at $4.25 per day. The receivers continued the employment of Cross, Thomas, Lapp, Favero and Collins in the capacities and at the rate of pay above given; and arranged with Ball and Bruyn to remain as watchmen at $4.25 per day, subject to adjustment for any claim they might have against Company as to higher rate of pay for balance of month of June.

Summary of Action Taken by Receivers Since Appointment:

Possession of the property was taken June 10th, and notice of the appointment of receivers posted at different mines and plants; arrangements were made to keep the watchmen then employed three being stationed at the Granite Mountain and Speculator mines, one for each eight hour shift; watchmen at the Tuolumne [89] and Main Range mines live on the premises; and the Sarsfield watchman lives adjoining the premises.

Fire Insurance:

Notice of appointment of receivers was promptly served on all insurance companies, and endorsements attached to policies showing acceptance of such notice and making policies payable to receivers. A detailed list of all insurance now in

force is attached, marked Exhibit "D" and made a part hereof.

Compensation Insurance:

The matter of Compensation Insurance was immediately taken up with the State Industrial Accident Board and arrangements made to carry insurance under Plan No. 3 covering employees of receivers; all leasers then operating were notified to discontinue operations until they had made similar arrangements covering their operations.

Arrangements With Leasers:

James Wilkie, having verbal lease or privilege of gathering up ore around bins and track at Granite Mountain mine, had gathered up approximately 40 tons of copper ore. He was given permission to ship ore, which has been done, and arrangement made with smelter for settlement thereof. Lease has been terminated.

S. O. Shaw had verbal lease to prospect and mine surface ores at Sarsfield mine, and had accumulated approximately 6 tons of copper ore. He was given permission to ship ore, which [90] will shortly be done, and arrangement made with smelter for settlement thereof. Lease was terminated.

Evan M. Fraser, A. G. Ray, A. F. Robertson hold a written lease from the Company, dated May 2, 1927, covering the right to mine and ship ore from the Birtha and Copper Queen claims at the Birtha mine. Written application was made by the leasers to continue operations under the lease, stating

conditions were such that cessation of operations for any length of time would probably result in loss of the workings opened by them, and probable loss of shaft. A letter has been written to leasers giving them permission to continue operations under the lease on certain conditions, such continuance to be effective as of the date they secure proper protection under Plan No. 3 of the Workmen's Compensation Act of Montana, and to be subject to confirmation and further order of the Court.

L. J. Coady and L. D. Frink hold a written lease from the company, embodied in various letters passing between them and the company, covering the right to mine and ship ore from the Sioux Chief vein to the 1,200 level in the Speculator mine, and to use the Speculator shaft for hoisting. They made written application for a continuance of the lease, stating that conditions were such that if operations were discontinued for even a short time, there was grave danger of losing the ore body from which they were shipping. At request of receivers Mr. Ball, former foreman of the Granite Mountain mine, made an inspection of the shaft and ground being worked by the leasers, and made a written report confirming the statements made by the [91] leasers. Shipments were being regularly made by the leasers. In view of conditions existing, the leasers were given permission to continue operations under the lease to July 31, 1927, subject to confirmation and further order of the Court. The leasers have arranged to carry proper

Workmen's Compensation insurance under Plan No. 3, and to indemnify and save harmless the receivers from all loss or damages account personal injuries, etc. Arrangements have been made with the smelter for settlement on the ores so shipped.

Application will be made to the Court at the earliest possible date for its further instructions and orders with respect to the leasing arrangements above referred to.

Arrangements are being made to give formal notice to all creditors by mail and by publication as provided in the order appointing the receivers.

Proper books of account have been opened in which proper accounts will be kept of all receipts and disbursements and transactions of the receivers.

Dated at Butte, Montana, June 18, 1927.

Respectfully submitted,
JOHN W. NEUKOM,
MATT L. ESSIG,
Receivers, North Butte Mining Company. [92]

EXHIBIT "A."

LIST OF MINING CLAIMS AND OTHER REAL ESTATE OF NORTH BUTTE MINING COMPANY.

The following lode mining claims in Township 3 North, Range 7 West, Montana Principal Meridian, in Silver Bow County, in the State of Montana, to wit:

Adelaide	U. S. Survey No.			3028	
Adelaide Fraction	"	"	"	6565	
Alta	"	"	"	1411	Lot No. 198
Anamosa	"	"	"	2463	Lot No. 350
Anamosa Fraction	"	"	"	7340	
Anna	"	"	"	2462	Lot No. 349
Birtha	"	"	"	3016	
Blake	"	"	"	5477	
Burner	"	"	"	1774	Lot No. 258
Carlisle or Carlyle	"	"	"	3515	
Copper Queen	"	"	"	3959	
Diamond	"	"	"	2504	Lot No. 355
Druid	"	"	"	2266	Lot No. 315
Emmie	"	"	"	5010	
Emporium	"	"	"	2187	Lot No. 307
Expert	"	"	"	2373	Lot No. 329
Extension No. 2	"	"	"	3155	
Fraction	"	"	"	2190	

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Hidden Treasure	U. S. Survey No.		2421	Lot No. 346
Hillside Fraction	"	"	" 7721	
Humbolt or Humboldt	"	"	" 2193	Lot No. 311
Independence	"	"	" 1146	Lot No. 142
Ironside No. 1 East	"	"	" 1796	Lot No. 262
Lot No. 3	U. S. Patent No. 454470			
Maggie	U. S. Survey No.		6730	
Maggie May	"	"	" 3753	
Monemia	"	"	" 5457	
Monitor	"	"	" 2188	Lot No. 308
Northwestern	"	"	" 1342	Lot No. 185
Pacific	"	"	" 2832	Lot No. 378
Pacific Fraction	"	"	" 7339	
Pittson	"	"	" 2063	Lot No. 291
Rabbit	U. S. Patent No. 473271			
Rabbit Trap	U. S. Survey No.		9667	
Red Jacket	"	"	" 5492	
Rio Tinto	"	"	" 5422	
Robin	"	"	" 6664	
Rockbreaker	"	"	" 2074	Lot No. 293
Rocky Bill	"	"	" 3896	
Saratoga	"	"	" 2691	Lot No. 369
Sarsfield	"	"	" 1130	Lot No. 139
Silver Bow Fraction	"	"	" 6286	
South Ridge	"	"	" 4082	

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Sunlight East	U. S. Survey No.		2189	Lot No. 309
Treat Fraction	"	"	" 8059	
Vesuvius	"	"	" 9455	
Golden Rule Placer	"	"	" 5418	

And also the following lode mining claims situate in Township 3 North, Range 7 West, Montana Principal Meridian, in Silver Bow County, in the State of Montana, to wit:

Evangelist	U. S. Survey No.			3935
Helen G.	"	"	"	3939
Irma S.	"	"	"	3934
Jimmy Collins	"	"	"	3938
Judge Morrow	"	"	"	3936
Mascot	"	"	"	3937

excepting the tracts and portions of the surface ground thereof, which are expressly accepted and reserved by a certain deed recorded at page 66, Book 109 of Deeds, Records of Silver Bow County, Montana.

And also the following lode mining claims situate in Township 3 North, Range 7 West, Montana Principal Meridian, in Silver Bow County, in the State of Montana, with the exceptions indicated in connection with each thereof:

Silver Moon, U. S. Survey No. 3940, and John the Baptist, U. S. Survey No. 3941, excepting the tracts and portions of the surface ground of said Silver Moon and said John the Baptist which are expressly excepted and reserved by a certain deed recorded at page 66, Book 109 of Deeds, records of Silver Bow County, [95] Montana, and also subject to the exceptions and reservations contained in a certain deed to a predecessor or predecessors in interest which is recorded at page 161, Book 107 of Deeds, records of Silver Bow County, Montana.

Horse Canyon, U. S. Survey No. 2642, Lot No. 363, excepting the tracts of surface ground of said Horse Canyon reserved in deeds to predecessors in interest recorded at page 90, Book 107, and page 162, Book 107, of Deeds, records of Silver Bow County, Montana.

Denver, U. S. Survey No. 5584, excepting that portion of the surface thereof sold and conveyed to Butte Electric Railway Company by a predecessor in interest by a deed recorded in Silver Bow County, Montana.

Lillie Fraction, U. S. Survey No. 6274, excepting the dwelling house of John Hopkins situate thereon reserved by predecessors in interest.

Copper Trust, U. S. Survey No. 3933, excepting the tracts and portions of surface ground thereon which are expressly excepted and reserved by a certain deed recorded at page 66, Book 109 of Deeds, records of Silver Bow County, Montana, and excepting also such portions of said Copper trust as are expressly reserved in a deed recorded at page 386, Book 107 of Deeds, records of Silver Bow County, Montana.

Elma, U. S. Survey No. 6792, excepting such portions thereof as are expressly reserved in a deed recorded at page 386, Book 107 of Deeds, records of Silver Bow County, Montana. [96]

And also the following fractional interests in lode mining claims, situate in Township 3 North, Range 7 West, Montana Principal Meridian, in Silver Bow County, in the State of Montana, to wit:

An undivided 3/8 interest in the Albert, U. S. Survey No. 6416.

An undivided 7/12 interest in the Grand Junction, U. S. Survey No. 1143, Lot No. 141.

An undivided 3/4 interest in the Little Boy, U. S. Survey 2750, Lot No. 372.

An undivided 1/2 interest in the Grand Junction Fraction, U. S. Survey No. 9141.

An undivided 5/8 interest in the Mabel, U. S. Survey No. 6525.

An undivided 1/2 interest in the Mullingar, U. S. Survey No. 3972.

An undivided 1/4 interest in the Richeliew, U. S. Survey No. 4855.

An undivided 5/6 interest in the Rosenthal, U. S. Survey No. 2062, Lot No. 290.

An undivided 2/3 interest in the Sleeper, U. S. Survey No. 3496.

An undivided 11/12 interest in the Eddie, U. S. Survey No. 3154, excepting 3.45 acres of surface ground of said Eddie lode claim reserved to predecessors in interest as shown by a certain deed recorded at page 71, Book 109 of Deeds, records of Silver [97] Bow County, Montana.

An undivided 1/2 interest in the west 1/2 of the Antoinette, U. S. Survey No. 4926, described as follows, to wit: Beginning at the southwest corner of No. 2 of said Antoinette Lode claim, U. S. Survey No. 4926, and running thence N. 69° 45′ E. 750 ft.; thence South 69° 45′ W. 750 ft.; thence S. 6° 45′ E. 615 ft.

The west 1/2 of the west 750 feet of the Annie, U. S. Survey No. 4927, and the water rights recorded at pages 68 and 69 of Book "A" of Water Rights, records of Silver Bow County, excepting 3.98 acres of surface ground described in and reserved by a deed of a predecessor in interest recorded at page 94, Book 107 of Deeds, records of Silver Bow County, Montana.

An undivided 1/2 interest in the mineral rights to the Hillside, U. S. Survey No. 2524, Lot No. 356, excepting *and* tracts and portions of surface ground thereof which are expressly excepted and reserved by a certain deed recorded at page 66, Book 109 of Deeds, records of Silver Bow County, Montana.

An undivided 1/2 interest in the mineral rights to the William, U. S. Survey No. 2408, Lot No. 338, excepting the tracts and portions of surface ground thereof, which are expressly excepted and reserved by a certain deed recorded at page 66, Book 109 of Deeds, records of Silver Bow County, Montana.

An interest in and to the Little Springs, U. S. Survey No. 5537, subject to the right of Thompson-Montana Company to a one-fourth interest in said claim which may hereafter be carried through to United States patent under its contract. [98]

An interest in and to the Fair Trial, located January 10, 1910, by J. A. Poore et al., including the ground covered by said Little Springs situated just northeast and adjoining the Sarsfield, U. S. Survey No. 1130.

The said Little Springs and said Fair Trial are in conflict and litigation is pending to determine the title to said claims.

The easterly portion of the Ella, U. S. Survey No. 1677, Lot No. 245, described as follows: Beginning at corner No. 2 of said Ella lode claim, U. S. Survey No. 1677, and running thence 63° 15′ west 399 feet to corner No. 3; thence south 89° 50′ west 415 feet to corner No. 4; thence south 53° 47′ west 662.9 feet along the north line of said Ella lode claim; thence south 63° 15′ east 673 feet to a point on the south line of said Ella lode claim; thence north 53° 47′ east 834.9 feet to the place of beginning.

The easterly portion of the Rising Sun, U. S. Survey No. 1681, Lot No. 246, described as follows: Beginning at corner No. 2 of said Rising Sun lode claim, U. S. Survey No. 1681, and running thence south 63° 15′ east 648.5 feet to corner No. 3; thence south 53° 47′ west 834.9 feet along the south side line of said Rising Sun lode mining claim; thence north 63° 15′ west 648.5 feet to a point on the north line of said Rising Sun lode mining claim; thence 53° 47′ east 834.9 feet to the place of beginning.

An interest in and to the Ironside, U. S. Survey No. 1182, Lot No. 152, as described in a certain deed, in which [99] Anaconda Copper Mining Company is grantor, and Butte Main Range Company is grantee, which said deed is recorded at page 553, Book 136 of Deeds, records of Silver Bow County, Montana.

An interest in and to that certain tunnel and

tunnel right of way and of ingress and egress and passage from the Alta lode claim, U. S. Survey No. 1411, northerly through, into and across the New Emerald lode claim to and into the Sunlight East lode claim, U. S. Survey No. 2189, known as the Monitor Tunnel, under permission and agreement with Joel Crossman and the heirs of said Joel Crossman (who is now deceased), the owners of said New Emerald lode claim.

The Mountain States Telephone and Telegraph Company, a Colorado corporation, has license under an agreement dated October 26, 1923, to construct, operate and maintain telephone lines, including poles, wires and fixtures, over, across and upon the following lode mining claims, to wit:

Burner	U. S. Survey No. 1774
Hidden Treasure	" " " 2421
Anna	" " " 2462
Independence	" " " 1146
Red Jacket	" " " 5492
Sarsfield	" " " 1130
Rising Sun	" " " 1681
Ella	" " " 1677

Said Telephone and Telegraph Company also has license for the same purpose under an agreement dated May 1, 1925, over, across and upon the following lode mining claims, to wit: [100]

Canyon	U. S. Survey No. 3386
Exemption	" " " 2311
Horse Canyon	" " " 2643
Albert	" " " 6416
Copper Trust	" " " 3933
Silver Moon	" " " 3940

All of the Adirondack, U. S. Survey No. 1105, Lot No. 132, except that portion thereof heretofore conveyed to the Anaconda Copper Mining Company, and described as follows:

Commencing at the northeast corner of said Adirondack claim, Survey No. 1105, Lot No. 132; thence running along the north side of said claim north, 74° 25′ west 290 feet; thence south, 24° 45′ west, 135 feet to a point of intersection in the east line of the Speculator lode mining claim, Survey No. 1100, Lot No. 129; thence along the south line of said Adirondack claim south, 83° 30′ east, 338 feet, to the southeast corner thereof; thence along the east end line of said Adirondack claim north, 83 feet to place of beginning, containing 0.767 acres.

Berlin	U. S. Survey No.	875	Lot No.	98
Copper Dream	"	"	"	5806	
Croesus	"	"	"	1226	Lot No. 165
Edith May	"	"	"	970	Lot No. 106
All of the Gem (West)	"	"	"	348	Lot No. 38A

—except that portion thereof heretofore conveyed to Anaconda Copper Mining Company and described as follows: [101]

Commencing at the southwest corner of said Gem lode claim, Lot No. 38A; thence running along the southerly line of said claim south, 64° east, 46 feet; thence 24° 30′ east 98.05 feet, to a point on the northerly line of said claim; thence along said northerly line of said claim north 64° west, 43 feet; thence along the westerly line of said claim south, 26° west,

98 feet, to the place of beginning, containing 0.10 acres, more or less.

All of the Gem (East), U. S. Survey No. 1157, Lot No. 148, except that portion thereof heretofore conveyed to the Anaconda Copper Mining Company and described as follows:

Commencing at the northeast corner of said Gem claim, thence running alont the east end line of said claim south 25° 40′ west, 78 feet, to a point of intersection with the south line of the Agnaw quartz lode mining claim, Survey No. 1517, Lot No. 212; thence along the south line of said Agnaw claim south 86° 30′ west 43 feet; thence along the south line of said Gem claim north 62° 45′ west 525.6 feet; thence along the extension of the west end line of said Agnaw claim north, 15° 40′ west, 102.1 feet to a point in the north line of said Gem claim; thence along the north line of said Gem claim south, 62° 45′ east, 581 feet to the northeast corner of said Gem claim, to the place of beginning, containing 1.304 acres, more or less.

An undivided one-third interest in the Free Trade, U. S. Survey No. 4208. [102]

Ground Hog	U. S. Survey No. 7272		Patent No. 42414
Hancock	" " "	4916	
Henry	" " "	9223	Patent No. 289677
Jake and Midget	" " "	9243	
Jessie	" " "	1070	Lot No. 122
John Emmit	" " "	5482	
Kink	" " "	9741	Patent No. 552295

An undivided 1/18 interest in the Lone Star, U. S. Survey No. 2644, Lot No. 364.

Lynchburg	U. S. Survey No. 1047	Lot No. 118
Miners Union		Lot No. 1097

An undivided 1/5 interest in the Occidental, U. S. Survey No. 3124.

Paul	U. S. Survey No. 6486	
Silver Queen Fraction	" " "	Lot No. 750

An undivided 5/6 interest in the Sioux Chief, U. S. Survey No. 1106, Lot No. 133, described as follows:

> Commencing at the northwest corner of said Sioux Chief lode mining claim, Survey No. 1106, Lot No. 133; thence running along the north line of said Sioux Chief claim south 74° 25′ east 254.5 feet; thence south 24° 45′ west 218.3 feet to a point in the south line of said Sioux Chief claim; thence along the south line of said Sioux Chief claim north 74° 25′ west 216.6 feet to the southwest corner thereof; thence along the west line of said Sioux Chief claim north 14° 45′ east 215.5 feet to the northwest corner of said claim, the place of beginning, containing 1.165 acres, [103] more or less.

Snowball
U. S. Survey No. 3946 Lot No. 5987

All that portion of the Speculator lode mining claim, U. S. Survey No. 1100, Lot No. 129, described as follows:

> Begining at corner No. 3 of said Speculator claim and running thence south 24° 45′ west 396 feet to corner No. 4 of said Speculator claim; thence north 70° 36′ west 394 feet to the southwest corner of the tract herein described; thence north 11° 21′ east, 308.2 feet to the northwest corner of the tract herein described; thence south 80° 42′ east, 481 feet to the place of beginning.

Sunset

U. S. Survey No. 7897 Patent No. 144745

An interest in the Silver Fraction.

All that portion of the Granite Mountain, Lot No. 208, described as follows:

An undivided ½ interest and estate in and to all that certain land and mining claim known and described, lying and being in Silver Bow County, State of Montana, and designated by the Surveyor General as Lot No. 208, and in and to all the ores, minerals and improvements thereon, therein or thereunto belonging, and also the whole of that part of the surface of said claim lying west of a line drawn parallel to the end lines of said claim and extending northward from the corner No. 4 of the Edith May claim in said county and state.

All of the Carlisle, U. S. Survey No. 2121, Lot No. 303, except that portion of the surface thereof heretofore conveyed to [104] the Butte and Superior Mining Company, a corporation by written instrument dated May 14, 1924, and described as follows:

> Beginning at corner "B" which is a point on the south side line of the Protection claim, Survey No. 2050, from which the southwest corner of said claim bears north 73° 57′ west, 350 feet, point "B" being coincident with the southeast boundary corner of the surface of the Protection claim now owned by the Butte and Superior Mining Company; thence south 73° 57′ east 415 feet along the south side line of said Protection claim to point "A" which is

coincident at point "A"; thence south 10° 30′ west 474.44 feet to point "C" which is on the south side line of the Carlile claim, and from which the southeast corner of the Carlile claim bears south 66° 15′ east 258.76 feet; thence north 66° 15′ west 424.27 feet along the south side line of the Carlile claim to point "D"; thence north 10° 30′ east 426.57 feet to point "B," the place of beginning, the said Carlile claim within the above-described boundaries being 4.2814 acres, more or less.

All of the Eva, U. S. Survey No. 2117, Lot No. 302, except that portion of the surface thereof heretofore conveyed to the Butte and Superior Copper Company, Limited, a corporation, by written instrument dated August 31, 1915, and described as follows:

Beginning at corner No. 1, a granite stone 20″x8″x6″ in [105] size, marked "1–2117," a mound of earth alongside, situate at the point of intersection of the south side line of Survey No. 1592, the Overman lode claim, with the east end line of Survey No. 1651, the Four Johns lode claim, from which the corner common to Sections 5, 6, 7 and 8, Township 3 North, Range 7 West, bears north 78° east, 268.5 distant; Thence first course, magnetic variation 21° east, south 2° east, along east end line of said Survey No. 1651, 350.5 feet to corner No. 2, a granite stone 20″x12″x10″, marked "2–2117," a mound of earth alongside, situate at the point of intersection of the north side line of Survey No.

1389, the Gustavus lode claim, with the east end line of said Survey No. 1651. Thence, second course, magnetic variation 21° east, south 65° 52′ east 630.5 feet to corner No. 1, Survey 1390, the Margaretha lode claim; 1093 feet to corner No. 3, a granite stone 24″x8″x6″, marked "3–2117," from which a granite stone 6′x5′x4′ above ground, marked "3–2117 B. R." bears north 9° 15′ east, 23 feet distant; and a granite stone in place 5′x′4x3′ above ground, marked "3–2117 B. R." bears south 39° east, 15 feet distant. Thence third course, magnetic variation 21° 15′ east, north 2° west, 220 feet, intersect north side line of Survey No. 1390, 236 feet to corner No. 4, a granite stone 20″x10″x8″, marked "4–2117," from which a granite stone in place 10′x8′x5′ above ground, marked "4–2117 B. R." bears south 68° 45′ east 19 feet distant; and a granite stone in place 6x3x2 feet above ground marked "4–2117 B. R." bears north 14° west, 20 feet distant; thence fourth course, [106] magnetic variation 21° 45′ east, north 60° 43′ west, 1148 feet to corner No. 1, the place of beginning. Expressly excepting and excluding from these presents all that portion of ground hereinbefore described embraced in said mining claims or Surveys Nos. 1389 and 1390 and described as follows, to wit:

Beginning at corner No. 2, Survey 2117, the Eva lode claim, thence south 65° 52′ east, 630.5 feet to corner No. 1, Survey 1390, the Mar-

garetha lode claim; thence north 16° 45′, east, 125 feet to corner No. 1, Survey, 1389, the Gustavus lode claim; thence north 77° 20′ west, 627 feet to the place of beginning, being that portion in conflict with Survey 1389, the Gustavus lode claim; and also that portion described as follows: Beginning at corner No. 3, Survey 2117, the Eva lode claim; thence north 2° 00′ west, 220 feet to the point of intersection of the east end line of Survey 2117, the Eva lode claim, with the north side line of Survey 1390, the Margaretha lode claim; thence south 85° 45′ west, 415.5 feet to corner No. 1, Survey 1390, the Margaretha lode claim; thence south 65° 52′ east, 462.5 feet to the place of beginning, being that portion of Survey 2117, the Eva lode claim, in conflict with Survey 1390, the Margaretha lode claim. The net area of ground contained in said Survey 2117, the Eva lode claim, being 4.66 acres of land, more or less.

All of the Gustavus, U. S. Survey No. 1389, Lot No. 195, except that portion of the surface thereof heretofore conveyed [107] to the Butte and Superior Copper Company, Limited, a corporation, by written instrument dated June 26, 1914, and described as follows:

Beginning at the southeast corner of the Gustavus claim, Survey No. 1389; thence S. 31° 10′ E., approximately 130.9 ft. to a point on the south side line of the Margaretha claim, Survey No. 1390; thence N. 85° 45′ E. 65 ft. to a point on the west side line of the Gem Mill

site, Survey No. 91; thence N. 67 ft. to the N. W. corner of the Gem Mill site; thence E. 330 ft. to the N. E. corner of the Gem Mill Site; thence S. 42.5 ft. to a point on the south side line of the Margaretha claim, a distance of 50 ft.; thence N. 12° 30′ W., approximately 566 ft. to a point on the north side line of the Margaretha claim; thence S. 85° 45′ W. along said north side line of the Margaretha claim 253.5 ft. to the northwest corner of said claim; thence N. 16° 45′ E. approximately 65 ft. to a point 50 ft. from the center line of the Northern Pacific Railroad track; thence in a southwesterly direction on a line paralleling said track and 50 ft. from the center line thereof for a distance of approximately 630 ft. to a point on the south side line of the Gustavus claim; thence S. 73° 15′ E. along said south side line 195 ft. to the point of beginning, containing an area of approximately 6.8 acres.

All of the Leaf, U. S. Survey No. 2116, Lot No. 301, except that portion of the surface thereof heretofore conveyed [108] to the Butte and Superior Mining Company, a corporation, by written instrument dated January 31, 1918, and described as follows:

(c) The surface only of that certain tract, lot, piece or parcel of ground, being a portion of the Leaf quartz lode mining claim, Survey No. 2116, Township 3 North, Range 7 West of the Montana Principal Meridian, County of Silver Bow, State of Montana, particularly described as follows, to wit:

Beginning at the northeast corner of the said mining claim, thence south 37° 30′ west, 281.5 feet, along the east end line, through its point of intersection with the north boundary of the Newell Homestead Entry No. 1721; thence south 89° 7′ west, 29 feet to the northwest corner of the said Homestead Entry; thence north 2° 45′ east, 280 feet, to a point on the north side line of the said Leaf claim; thence south 73° 15′ east, 195 feet, to the place of beginning, containing an area of .67 acres.

An undivided ½ interest in the Lillie May, U. S. Survey No. 7515, save and except the surface thereof heretofore conveyed to the Butte and Superior Mining Company, a corporation, by written instrument dated August 31, 1918.

All of the Margaretha, U. S. Survey No. 1390, Lot No. 196, except that portion of the surface thereof heretofore conveyed to the Butte and Superior Mining Company by written [109] instrument dated June 26, 1914, and described as follows:

Beginning at the southeast corner of the Gustavus claim Survey No. 1389; thence S. 31° 10′ E. approximately 130.9 ft. to a point on the south side line of the Margaretha claim, Survey No. 1390; thence N. 85° 45′ E. 65 ft. to a point on the west side line of the Gem Mill Site, Survey No. 91; thence N. 67 ft. to the N. W. corner of the Gem Mill Site; thence E. 330 ft. to the N. E. corner of the Gem Mill Site; thence S. 42–5 ft. to a point on the south side

line of the Margaretha claim; thence N. 85° 45′ E. along said south side line of the Margaretha claim, a distance of 50 ft.; thence N. 12° 30′ W., approximately 566 ft. to a point on the north side line of the Margaretha claim; thence S. 85° 45′ W. along said north side line of the Margaretha claim 253.5 ft. to the northwest corner of said claim; thence N. 16° 45′ E. approximately 65 ft. to a point 50 ft. from the center line of the Northern Pacific Railroad track; thence in a southwesterly direction on a line paralleling said track and 50 ft. from the center line thereof for a distance of approximately 630 ft. to a point on the south side line of the Gustavus claim; thence S. 73° 15′ E. along said south side line 195 ft. to the point of beginning; containing an area of approximately 6.8 acres;

and except that portion of the surface of said Margaretha claim heretofore conveyed to said Butte and Superior Mining Company by written instrument dated January 31, 1918, and described as follows: [110]

Beginning at the southwest corner of said mining claim, thence north 16° 45′ east, along the west side of the said claim, 125 feet; thence south 31° 10′ east, 130.9 feet, to a point on the south side line of said claim; thence south 85° 45′ west, 104 feet, to the place of beginning, containing an area of .14 acres.

All of the Protection, U. S. Survey No. 2050, Lot No. 289, except that portion of the surface

thereof heretofore conveyed to the Butte and Superior Mining Company, a corporation, by written instrument dated May 14, 1924, and described as follows:

> Beginning at corner No. 1, Survey No. 2050, Lot No. 289, the Protection lode claim, as recorded in Patent Book "F," page 235, of the records of Silver Bow County, Montana; thence first course, south 79° 15′ east, 550 feet along line 1–2 of said Protection claim to a point; thence second course, south 43° 47′ west, 365.2 feet to a point on line 3–4 of said Protection claim; thence third course, north 73° 57′ west, 350 feet along line 3–4 of said Protection claim to corner No. 4 of said claim; thence fourth course, north 10° 30′ east, 91 feet along line 4–1 of said Protection claim to the point of intersection with line 1–2 of Survey No. 1202, Lot No. 159, the Elm Orlu lode claim; thence fifth course north 85° 38′ east, 78 feet along line 1–2 of said Elm Orlu claim to corner No. 2 of said Elm Orlu lode claim; thence sixth course, north 15° 00′ west, 177 feet along line 2–3 of said Elm Orlu claim to the point [111] of intersection of said line 2–3 with line 4–1 of said Protection claim; thence seventh course, north 10° 30′ east, 3 feet along line 4–1 of said Protection claim to the place of beginning; that part and parcel of ground as hereinbefore described, being a portion of the West end of the said Protection lode claim, and containing 2.86 acres of land, more or less;

and except that portion of the surface of said Protection claim heretofore conveyed to said Butte and Superior Mining Company by written instrument dated May 14, 1924, and described as follows:

Beginning at corner "B" which is a point on the south side of the Protection claim south 73° 57′ east 350 feet from the southwest corner of said claim, said point "B" being coincident with the southeast corner of the surface area of the Protection claim now owned by the Butte and Superior Mining Company; thence south 73° 57′ east 415 feet along the south side line of said Protection claim to point "A"; thence north 10° 30′ east, 324.77 feet to point "E" which is a point on the south side line of the Four Johns claim, Survey No. 1651, located south 72° 50′ east 143.30 feet from the southwest corner of said claim; thence north 72° 50′ west 143.30 feet along the south side line of the Four Johns claim to point "F" which is coincident with the southwest corner of the Four Johns claim; thence north 2° 0′ west 3.5 feet along the west end line of the Four Johns [112] claim; to a point "G" which is coincident with the southeast corner of the Black Rock claim; thence north 79° 15′ west 69.5 feet along the south side line of the Black Rock claim; Survey No. 596 to point "H" which is coincident with the northeast corner of the area of the Protection claim now owned by Butte and Superior Mining Company; thence south 43° 47′ west 365.20 feet to point "B," the place of begin-

ning, the area within the above described boundaries being 2.3420 acres, more or less.

Said Adirondack, Edith May and Miners Union lode mining claims are subject to the certain right of way license dated February 10, 1919, granted to the Chicago, Milwaukee and St. Paul Railway Company, a corporation, for the construction, maintenance and operation of a railroad through, over and across said claims, reference to which said license is hereby made for greater certainty.

Said Adirondack, Edith May, Copper Dream, Granite Mountain, Ground Hog, Jessie, Hancock, Miners Union, Speculator and Tuolumne lode mining claims are subject to the certain right of way license dated June 15, 1926, granted to the Butte, Anaconda & Pacific Railway Company, a Montana corporation, for the construction, maintenance and operation of a railroad through, over and across said claims, and each of them, reference to which said license is hereby made for greater certainty.

All of which properties are subject to the lien of the certain deed of trust or mortgage dated January 2, 1926, and of the certain supplemental deed of trust or mortgage dated January 2, 1927, which latter mortgage is supplemental to said mortgage of January 2, 1926, in both of which said mortgages North Butte Mining Company is party of the first part, and Central Union Trust Company of New York, as Trustee, is party of the second part. Said mortgage of January 2, 1926, was recorded on July 14, 1926, in Book 75, at page 446, of Mortgage Records of Silver Bow County, [113] Montana,

and said supplemental mortgage of January 2, 1927, was recorded on January 25, 1927, in Book 76, at page 156, of Mortgage Records of Silver Bow County, Montana. Both said mortgage and supplemental mortgage were given to secure an issue of Ten-Year First Mortgage Convertible Sinking Fund Bonds with interest payable semi-annually at the rate of 7% per annum from January 2, 1926, in the aggregate amount of $1,500,000.00, and of which bonds there are now outstanding, unpaid, but not matured, $364,100.00 face value thereof.

Also the following lode or placer mining claims or fractional interests in lode or placer mining claims, situate in Township 3 North, Range 7 West, Montana Principal Meridian, in Silver Bow County, in the State of Montana:

Lillie	U. S.	Survey	No.	1593	Lot No. 230
Butte Main Fraction	"	"	"	10004	
Golden Hematite	"	"	"	1580	Lot No. 237
Kingstella	"	"	"	6210	
Little McQueen	"	"	"	6173	
Maggie Placer	"	"	"	5719	
Rory O'More	"	"	"	4854	
Sinbad	"	"	"	4929	
Snow Bird, Placer	"	"	"	5655	
Spread Delight	"	"	"	1972	Lot No. 281
Syndicate	"	"	"	10137	
Tent Peg	"	"	"	9460	
Undine	"	"	"	5412	

[114]

All of the Tuolumne lode mining claim, Survey No. 1468, Lot No. 203. Subject to the following Indentures:

(a) A deed of trust or mortgage dated the 1st day of March, 1920, wherein Tuolumne Copper Mining Company, an Arizona corporation, is party of the first part, and John E. Stephenson, of Butte, Montana, as Trustee, is party of the second part, which was recorded on said day in Book 61, on page 511, of the Mortgage records of Silver Bow County, Montana, which said mortgage was given to secure an issue of Five-Year Convertible Gold Bonds, with interest payable semi-annually at 7% per annum from March 1, 1920, in aggregate amount of $500,000.00, of which bonds there are now outstanding, unpaid, and past due since March 1, 1925, $115,500.00 face value thereof.

(b) A deed of trust or mortgage dated the 16th day of April, 1923, wherein the Company is party of the first part, and said John E. Stephenson, as Trustee, is party of the second part, which was recorded on the 18th day of April, 1923, in Book 69, at page 571, of the Mortgage records of Silver Bow County, Montana, which mortgage was given to secure an issue of Ten-Year Mortgage Convertible Bonds, with interest payable semi-annually at 7% per annum from April 17, 1923, in the aggregate amount of $750,000.00 of which bonds there are now outstanding, unpaid but not matured, $2,200.00 face value thereof.

(c) A deed of trust or mortgage dated the 7th day of January, 1924, wherein Tuolumne Copper

Company, a Montana corporation, is party of the first part, and J. K. Heslet, of Butte, Montana, as Trustee, is party of the second part, which was recorded on the [115] 13th day of June, 1924, in Book 155, at page 488, of the Mortgage records of Silver Bow County, Montana, which mortgage was given to secure an issue of Ten-Year Mortgage Convertible Bonds, with interest payable semi-annually at the rate of 7% per annum from January 7, 1924, in the aggregate amount of $750,000,00, of which bonds there are now outstanding, unpaid but not matured, $25,450.00.

(d) The deed of trust or mortgage of January 2, 1926, and the supplemental deed of trust or mortgage of January 2, 1927, both of which are hereinbefore referred to and more fully described.

The North Butte Mining Company controls through ownership of over 90% of the capital stock of the Amazon Butte Copper Company, a Montana corporation, the following mining claims and fractions situate in Silver Bow County, Montana:

Amazon	Survey	No.	599	13.9 acres
Altoona	"	"	1619	7.49 "
Antoinette	"	"	4926	17.68 "
Gaynor	"	"	2970	10.43 "
Henrietta	"	"	5049	11.48 "
Jessie	"	"	4925	15.06 "
Annie	"	"	4927	9.03 "
Bertha	"	"	4928	20.65 "
Josephine	"	"	4924	19.61 "

—and controls through ownership of over 90% of the capital stock of the Butte Exemption Copper

Company, a Maine corporation, the following mining claims and fractions situate in Silver Bow [116] County, Montana:

Canyon	¾ interest	12.93	acres
Coleen Bawn	¾ interest	16.72	"
Exemption	¾ interest	20.50	"
Mountain Spur		6.51	"

The North Butte Mining Company also owns Section 31, in Township 4 North of Range 9 West, Montana Principal Meridian, Silver Bow County, Montana, containing 620 acres, more or less; the northeast (NE.) quarter, and the northwest (NW.) quarter, and the southeast (SE.) quarter, and the northeast (NE.) quarter of the Southwest (SW.) quarter of Section 36, Township 4, North of Range 10 West, in Deer Lodge County, Montana, containing 520 acres; and the east half of (E./2) of the southwest (SW.) quarter of Section 25, Township 4 North of Range 10 West, in Deer Lodge County, Montana, consisting of 80 acres, and including certain water rights.

Three tracts of land hereinabove last described are not subject to the lien of the mortgages hereinbefore referred to. [117]

EXHIBIT "B."

INVENTORY OF MACHINERY, EQUIPMENT AND SUPPLIES.

NORTH BUTTE MINING COMPANY.

GRANITE MOUNTAIN MINE:

Change House with 600 steel lockers.

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36 Waugh stopers.
28 water Leyners.
8 jackhammers.
20 column bars complete.
1 Tugger machine.
4 mine telephones.
23 ventilating fans with motors (mounted on trucks).
1–75 H. P. Genl. Elec. motor.
7–20 H. P. Westinghouse motors.
1–60 H. P. Westinghouse motor.
1–300 Gal. electric pump.
1–300 gal. Prescott air pump.
7–#4 Sirroco blowers.
1 motion picture projector.
Mining engineers' equipment.
Bolts, nuts, nails, spikes, etc.
Office equipment.
7 gas helmets.
1 acteylene welding machine.
1 I. R. wood boring machine.
Mine tools. [118]
Air and water hose.

Electric Hoist Building:

1 Wellman-Seaver-Morgan Westinghouse Electric motor driven hoising engine, with motor generator sets and extra motor.

Transformers.

Electric Hoist Head Frame with idler towers.

2–4500 Ft. 1–½" 1–3300 ft. 1–⅛" steel cables.

Auxiliary engine-house:

1 single drum slide valve auxiliary engine.

Combination machine, blacksmith, rope & pipe-shop.

Machine shop equipment, tools & supplies:

1 Knowles feed pump.

Blacksmith-shop equipment, including:

2 drill sharpeners.

1 power punch.

1 power hammer.

2 forges & anvils.

5 tons drill steel.

Pipe Shop Equipment:

1 pipe cutting & threading machine.

Rope House Equipment:

Chain blocks, rope & tackle.

Ventube.

GRANITE MOUNTAIN SURFACE:

Drill steel, 10 tons.

350 mine cars.

8 steel crates.

400 feet 4" wood lined pipe.

200 feet 6" wood lined pipe. [119]

2 small Prescott air pumps.

25 Bacon timber hoists.
19 Baldwin electric locomotives.
8 water-tanks mounted.
15 mine cages.
3 ore skips.
1–12 ft. sheave wheel.
12 mine toilet cars.
64 timber trucks.
400 ft. 25# mine rail.
6 tons scrap pipe.
1 Hendrie & Bolthoff geared hoist.
2–#9 Cameron sinking pumps.
2–30 KVA transformers.
1–20 H. P. Westinghouse motor (burned out).
1 reel 4500 feet 1–½" plow steel cable.
1 reel 3300 feet 1–⅛" plow steel cable.
Steel 1 beam shaft sets, suff. for 100 ft. of shaft.
3–150 H. P. boilers.
46000 feet 3" lumber.
Framed round timbers.
96–4x9 framed guides.
Miscl. machinery, parts and supplies in poor condition and of questionable value.

SPECULATOR MINE:

Transformer House: [120]

5 transformers.

Compressor Building:

1–500 H. P. Nordberg belt driven compressor.
1–600 H. P. Ingersoll-Rand compressor.
1375 R. P. Ingersoll-Rand compressor.
1 extra rope for belt drive compressor.

Surface:

6 air receivers.
1. Duplex pump.
1 inter cooler pump.
2 sheave wheels.
1 Hendrie Bolthoff geared hoist.
Steel head frame.
22 mine cars.
4 skips.
2 toilet cars.
4 timber hoists.
1 gunite machine.
40 pr. mine car wheels.
36 steel car frames.
7 sinking pumps (bad order).
Miscl. machinery, parts and supplies in poor condition and of questionable value.

Garage:

1–5 ton White truck. [121]
1–¾ ton Dodge truck.

Timber Framing Shop:

1 double end framer with 35 H. P. G. E. motor.
1 single end framer with 20 H. P. G. E. motor.
2 swing cut-off saws.
1 portable slab saw 20 H. P.
1 wedge cut-off saw 10 H. P.

Planing-mill:

1–20 H. P. G. E. motor.
1–2 H. P. G. E. motor.
1–24″ planer.
1–16″ jointer.
1 band saw.

1–5 H. P. Westinghouse motor.
1 drill press.
1 lathe.
2 saw filing machines.
1 planing knife grinder.
1 ladder cutting machine.
1 grindstone.

Blacksmith-shop:

1 steam hammer.

Fan-house:

1 large blower. [122]
1–150 H. P. Westinghouse motor.
2 hand fire-hose carts with hose.

Leasers' Engine-room:

2 Hendrie & Bolthoff geared hoists.
(1 in poor order.)
6 stopers.
1 jackhammer.

Engine-room:

1 Nordberg double drum steam hoisting engine.
1 single drum auxiliary hoist.
1 traveling hand crane.
1 extra disc wheel for Nordberg engine.
1 large Mosler safe.
1 small Hall safe.

Fan-house:

12 #2½ fans with 7½ H. P. G. E. motors.
1 #2–½ fan.
1 #2 fan.
1–20 H. P. motor.

1 Grout mixer.
1 portable fire-extinguisher.

Assay Office:

1 portable fire-extinguisher.
1 ore crusher.
1 pulverizer. [123]

Warehouse:

7 pr. mine locomotive trucks.
1500# scrap copper wire.
98 stopers.
42 water Leyners.
1 #2½ fan with 7½ H. P. motor.
1 set brass bearings for Granite Mountain Hoist.

Boiler-room:

2–150 H. P. marine boilers.
3–150 H. P. Sterling boilers.
2–150 H. P. locomotive boilers.
2 condenser pumps.
1 Duplex feed pump.
30 tons slack coal (inaccessible).

Timber Yard:

3600 10 ft. lag poles.
24000 feet 12x12 timbers.
18000 " 10x10 "
3000 " 5x10 "
24000 " 2" lumber.
1000 " 3" "
2000 " 1" "

Office Building:

Furniture. [124]

TUOLUMNE MINE.

Office, Watchman Residence.

Engine-house:

1 Nordberg dble. drum compound steam hoisting engine.
1 Hendrie & Bolthoff small geared hoist.
1 traveling crane.

Boiler & Compresser Building:

1 large Nordberg steam air-compressor.
(Carpenter-shop:
(No equipment.
(1 lumber truck.
Steel cooling tower.
Air receiver.
7 mine cages.
5 ore cars.
2 rubbish cars.

GEM MINE:

1 50 H. P. boiler.
1 ventilating fan.
1 75 H. P. Westinghouse motor.

MAIN RANGE MINE:

Machine-shop 30x60 equipped with fire-hose connections:

1 large lathe with motor. [125]
1 planer with motor.
1 drill press with motor.
1 large pipe threader with motor.
1 small pipe threader with motor.
1 emery-wheel with motor.

1 small drill press incomplete.
1 traveling chain block.
1 fan with 7½ H. P. motor.
1 Prescott sinking pump.
2 transformers 3 K. V. A.
1 large G. E. transformer.
1 15 H. P. G. E. motor.
1 small cent. pump.
1 large cent. pump.
1 starter for 125 H. P. motor.
1 125 H. P. motor frame & coil.
1 box motor parts.
8 pipe tongs.
4 7″ brass bushings.
6 steel lockers.
1 small air receiver.
1 electric drill press with motor.
1 Yankee drill grinder with motor.
1 American Tool Co. lathe with motor.

Store-room: [126]

Miscl. pipe fittings.
Bolts & nuts.
Spike & nails.
Picks & shovels (used).
8 rolls tar paper.
Used air hose.
500 ft. 3″ fire-hose.

Blacksmith-shop:

1 scrap Dodge touring car.
1 drill sharpner.
Forge, anvil & vise.

Emery wheel with motor.
1 ventilating fan.

Carpenter-shop:

1 planer.
1 swinging cut-off saw.
1 wedge saw.
1 framing machine.
Miscl. tools.
1 motor for driving machinery.

Engine & Compressor Room:

1 435 H. P. G. E. motor.
1 Ingersoll Rand compressor with receivers.
1 Nordberg dble. drum hoist with G. E. 275 H. P. motor starters, switch board, etc. [127]
1 225 H. P. Elec. motor.
1 15 H. P. Elec. motor.
1 transformer.
1 small air hoist.
1 stencil machine.
1 250 H. P. motor.

Rope House:

1 single drum air hoist.
Miscl. block & tackle.

Transformer House:

6 transformers.
Office, Watchman Residence.

Surface:

1000 ft. 10″ and 12″ column pipe with fittings, flanges, bolts & nuts.

3 air receivers.
1 900-gal. Imperial Iron Works pump.
3 mine cages.
1 sheave wheel.
3 bailing skips.
26 mine cars.
1 small air hoist.
1 ton mine rails.
Miscl. tools & drill steel. [128]
22 mine cars.
75000 feet mine timber.
250 stulls aver. 10″ 16 ft. long.
Miscl. machinery, parts and supplies in poor condition and of questionable value.

SARSFIELD MINE:

1 Ingersoll Rand Imperial type 10 compressor.
1 100 H. P. G. E. induction motor.
1 small dble. drum geared electric hoist.
1 112 H. P. G. E. induction motor.
1 steel head-frame.

MISCELLANEOUS:

Office furniture and fixtures, including standing desk, large table desk, flat-top desk, 1 typewriter desk, 2 drafting tables, 2 steel safe cabintes, filing cabinet, 2 typewriters, 2 adding machines, 2 calculating machines, chairs, etc.
1 Cadillac touring car, 1921 model.
1 Essex Sedan, 1927 model. [129]

EXHIBIT "C."

STATEMENT OF CASH, ACCOUNTS RECEIVABLE AND OF BONDS, NOTES AND ACCOUNTS PAYABLE OF NORTH BUTTE MINING COMPANY AS OF JUNE 10, 1927.

Cash on deposit—First National Bank, Butte....	$ 613.99	$
Subject to checks previously issued and outstanding	178.75	434.44
Accounts Receivable:		
Fraser, Robertson & Ray, Compensation	12.85	
W. H. Kellett—ground rent	10.00	
Advance account railroad ticket	77.48	
Anaconda Copper Mining Co.—royalty on and proceeds from ore delivered at smelter and in transit May 1 to June 10th	24,273.79	

Coady & Frink—supplies sold.....	353.75	
Higgins & Walker—balance due for advances made account leasing operations	1,354.72	26,082.59
Total		26,517.03
Liabilities:		
7% Bonds of Tuolumne Copper Mining Co., issue of Mar. 1, 1920, payment of which was assumed by North Butte Mining Company under terms of merger agreement of Nov. 24, 1925; past due since Mar. 1, 1925	115,500.00	
7% Bonds of Tuolumne Copper Mining Company, issue of April 16, 1923, payment assumed under merger contract; due April 16, 1933		
7% Bonds of Tuolumne Copper Co., a Montana	2,200.00	

Brought Forward	$117,700.00	
corporation, issue of [130] Jan. 7, 1924; lien subordinate to above issues on properties purchased by North Butte under merger contract above referred to; due Jan. 1, 1934.....	25,450.00	
Total	143,150.00	
7% Bonds of North Butte Mining Co., issued under mortgage of Jan. 2, 1926, and supplemental mortgage of Jan. 2, 1927; due Jan. 2, 1936..	364,100.00	
Total Bonded Indebtedness	$507,250.00	$507,250.00
Notes Payable:		
Silver Bow Securities Co., Int. 6%, past due, balance unpaid	4,500.00	
Montana Power Company, Int. 6% past due since May 1, 1927	40,000.00	

(Above 2 items original obligations of Tuolumne Copper Co. assumed under merger.)		
Francis H. Hardy, Int. 7% past due since June 1, 1927—$25,000.00 North Butte Bonds held as collateral security	6,500.00	
Chatham & Phoenix National Bank, New York, past due since June 8, 1927—$20,000.00 North Butte Bonds held as collateral	10,000.00	
Total Notes—past due	$ 61,000.00	$ 61,000.00
E. C. Kennedy, due June 23, 1927—$10,000.00 North Butte Bonds held as collateral	2,500.00	
T. F. Cole, due July 1, 1927—$10,000.00 North Butte Bonds held as collateral	2,500.00	
Chatham & Phoenix National Bank, New York, due July 3, 1927—$20,000.00 North Butte Bonds held as collateral	10,000.00	15,000.00

[131]

Accounts Payable:	
A. C. M. Co. Pur. Dept., mining, hdwr.	14,148.16
A. C. M. Co. Pur. Dept., coal	175.18
A. C. M. Co. Pur. Dept., pumping service	300.00
Montana Power Company, electric power	16,149.50
Hudtloff-Marquis Co., mining timbers	3,907.88
J. M. Schiffman, mining timbers	3,785.77
Butte Water Company, water and hydrant rent	500.10
C. & F. Teaming Co., trucking service	207.95
F. X. Giard, Agent, office rent	375.00
Owl Creek Coal Co., coal	412.89
General Electric Co., rotor	1,415.96
Westinghouse Elec. Co., electric supplies	22.89
Martindale Elec. Co., electric supplies	43.70
Mountaineer Welders, oxygen gas	38.00
Mtn. View Cemetery, cemetery care	200.00
Western Iron Works, parts and labor	176.71

Roundup Coal Co., coal	157.65
Butte & Superior M. Co., steel	4.98
B. A. & Pac. Ry. Co., cleaning track	7.16
Industrial Accd. Brd., compensation premium	402.03
Hospitals, hospitals dues	70.00
Montana Cadillac Co., repairs of auto	8.60
Telephone Co., phone rental	26.20
Telegraph Co., telegrams	11.37
U. S. Internal Revenue, tax at source Tuol. bonds 1926	317.15
J. H. Heilbronner, fire insurance	203.50
C. E. Meagher, fire insurance	336.55
Sheehan-Goodwin, fire insurance	286.65
W. J. Thomas, fire insurance	140.00
Slemons & Booth, fire insurance	205.00
Morley & Thomas, fire insurance	338.00
A. T. Morgan, fire insurance	252.80

M. Y. Daniels, fire insurance	200.00	
Equitable Office Bldg. Corpn., rent and services	2,496.18	
American Trust Co., Transfer Agent	337.41	
	47,660.92	47,660.92
Tuolumne Accounts Assumed:		
A. C. M. Hdwr. Co.—$50,000.00 Tuolumne Bonds held as collateral security	28,021.36	
Kremer, Sanders & Kremer	1,000.00	
Western Iron Works	500.00	
J. M. Schiffman	500.00	
Beacon Trust Company	330.00	
[132]		
Brought Forward		47,660.92
State St. Trust Company	$ 945.86	
C. A. O'Leary	437.40	

T. E. Murray	75.92	
	31,810.54	31,810.54
Total Bills Payable		$ 79,471.46
TOTAL LIABILITIES		$662.721.46

EXHIBIT "D."

FIRE INSURANCE POLICIES.

Issued by	Policy No.	Amt.	Yr. Prem.	Expires.
Great American Ins. Co. N. Y.....	231711	15000.00	286.65	Jan. 19, 1928
Phoenix Assurance Co. Ltd. of London	372115	10000.00	191 10	Do
New York Underwriters Ins. Co., N. Y.	310832	10000.00	191 10	Do
The Continental Ins. Co., N. Y.	4656	8000.00	152 80	Apr. 6, 1928

Issued by.	Policy No.	Amt.	Yr. Prem.	Expires.
The Continental Ins. Co., N. Y.	4657	5000.00	100 00	Apr 6, 1928
Springfield Fire & Marine Ins. Co., Mass.	67717	3000.00	60 00	Do
Hartford Fire In.s Co., Conn.	9009	10000.00	200 00	Do
Firemens Fund Ins. Co., of San Francisco., Cal.	182781	30000.00	345 00	Do
[133]				
Fire Assn. of Phila.	5713654	15000.00	286.65	Apr. 6, 1928
Lafayette Fire Ins. Co., New Orleans, La.	108878	7000 00	140 00	Do
The Franklin Fire Ins. Co. of Phila.	416	5000 00	95 55	Do
Do	418	5000 00	100 00	Do
Do	415	6000 00	141 00	Do
Springfield Fire & Marine Ins. Co., Mass.	67713	7000 00	143 50	Apr. 26, 1928
Niagara Fire Ins. Co.	784470	10000 00	205 00	Do
Caledonian Ins. Co. of Edinburgh, Scotland	703335	13000 00	338 00	June 10, 1928
		$159000.00	$2976.35	

PROPERTY COVERED BY FIRE INSURANCE.

	Amt.	Amt.
Granite Mountain Mine:		30000.00
Change house	15000.00	
Contents	15000 00	
Speculator Mine:		49000.00
Compressors	30000 00	
Timber framing shop	3000 00	
Contents same	10000 00	
Planing-shop	3000 00	
Contents same	3000 00	
Tuolumne Mine:		17000.00
Engine-room	2000 00	
Contents	12000 00	
Carpenter shop bldg.	1000 00	
Boiler-house contents	2000 00	
Maine Range Mine:		61500.00
Engine & Compressor bldg.	5000 00	
Contents	25000 00	

[134]

Machine-shop	6500.00
Contents	13500.00
Timber Framing mill	2000.00
Contents	4000.00
Blacksmith-shop	1500.00
Contents	500.00
Storeroom	300.00
Contents	1000.00

	Amt.	Amt.
Boiler-house	1200.00	
Change-house	500.00	
Contents	500.00	
		1500.00
Colusa Leonard:		
Hoist Building	500.00	
Contents	1000.00	
		$159000.00

[Endorsed]: Filed June 20, 1927.

THEREAFTER, on July 5th, 1927, certified copies of the petition for instructions with respect to payment of interest, order with respect to payment of interest, petition for order confirming acts of the receivers, order confirming acts of receivers and authorizing lease, petition to amend the order appointing receivers, and order amending the order appointing receivers, as filed and entered in the primary suit of Francis H. Hardy vs. North Butte Mining Company, in the United States District Court, District of Minnesota, was filed herein, and being in the words and figures as follows, to wit: [135]

[Title of Court and Cause.]

REQUEST FOR INSTRUCTION No. 1.

To the Honorable WILLIAM A. CANT, Judge of the United States District Court, District of Minnesota, Fifth Division:

Now comes John W. Neucom and Matt L. Essig, the duly appointed, qualified and acting receivers of North Butte Mining Company, and respectfully represent to the Court as follows:

1. That the North Butte Mining Company has at present issued and outstanding under its certain deed of trust or mortgage of January 2, 1926, and under its certain supplemental deed of trust or mortgage of January 2, 1927, both of which are more particularly referred to and described at page 16 of Exhibit "A" attached to the Preliminary Report of the Receivers heretofore filed, its Ten Year First Mortgage, Convertible Sinking Fund Bonds, in the aggregate principal amount of $364,700.00, [136] bearing interest at the rate of seven per cent (7%) per annum, payable semi-annually on the 2d days of January and July in each year, and that the semi-annual interest instalment upon said bonds, falling due July 2, 1927, as evidenced by the interest coupons attached thereto, amounts to the sum of $12,764.50.

2. That there are at present issued and outstanding under the certain deed of trust or mortgage dated January 7, 1924, between Tuolumne Copper Company and J. K. Heslett, of Butte, Montana, as Trustee, which mortgage is more particularly de-

scribed at page 18 of Exhibit "A" of the Preliminary Report of the Receivers heretofore filed, the Ten Year Mortgage Convertible Bonds of said Tuolumne Copper Company in the aggregate principal sum of $25,450.00, bearing interest at the rate of seven per cent (7%) per annum, payable semi-annually on the 7th days of January and July in each year, and that the semi-annual interest installment falling due on July 7, 1927, as evidenced by the coupons attached thereto, amounts to $890.75.

3. The receivers further respectfully represent that they have not sufficient funds in hand with which to make payment of the interest instalments so maturing on July 2, 1927, and July 7, 1927, respectively, and that they will be unable to make such interest payments unless it is possible for them to issue and sell receivers' certificates to secure the funds required; and, in the opinion of the receivers, it would be difficult for them at this time to dispose of receivers' certificates issued for the purpose of paying interest coupons in an amount sufficient [137] to provide the funds necessary.

4. The receivers further respectfully represent that they do not see wherein the payment of said interest instalments would be of material or substantial benefit to the creditors of said North Butte Mining Company nor wherein the failure to pay said interest instalments would militate against the best interests of the creditors of said Company.

WHEREFORE, your receivers respectfully request the Court for its instructions as to the pay-

ment or nonpayment of said interest instalments hereinabove referred to.

Dated June 28, 1927.

Respectfully submitted,
JOHN W. NEUKOM,
MATT L. ESSIG,
Receivers, North Butte Mining Company.
By JOHN W. NEUKOM,
One of Said Receivers.

State of Minnesota,
County of St. Louis,—ss.

John W. Neukom, being first duly sworn, says that he is one of the receivers of the North Butte Mining Company heretofore duly appointed in the above-entitled cause; that the facts stated in the above request for instructions are true as he verily believes.

JOHN W. NEUKOM.

Subscribed and sworn to before me this 28th day of June, A. D. 1927.

E. B. NORRIS,
Notary Public, St. Louis County, Minn.

My commission expires March 7th, 1930. [138]

[Title of Court and Cause.]

ORDER DIRECTING NONPAYMENT OF INTEREST COUPONS.

This matter came on for hearing June 28, 1927, on written application of John W. Neukom and Matt L. Essig, as receivers of North Butte Mining Company, requesting instructions with respect to payment of interest coupons maturing July 2, 1927, in the sum of $12,764.50 on the Ten Year First Mortgage Convertible Sinking Fund Bonds of the North Butte Mining Company, and as to the payment of interest coupons maturing July 7, 1927, amounting to $890.75 on the Ten Year Mortgage Bonds of the Tuolumne Copper Company.

It appearing to the Court that the receivers have not sufficient funds in hand to pay said coupons, that it would be difficult at this time to dispose of receivers' certificates issued for the purpose of paying interest coupons and that the [140] payment of said interest coupons would not be of material or [140] substantial benefit to the creditors of the said North Butte Mining Company and that failure to pay said interest coupons would not militate against the best interests of the creditors of the said Company.

The receivers are, therefore, hereby ORDERED AND INSTRUCTED not to pay said interest coupons maturing July 2d and July 7th, respectively.

Dated June 29, 1927.

By the Court:

WM. A. CANT,
Judge.

United States of America,
District of Minnesota,
Fifth Division,—ss.

I, Joel M. Dickey, Clerk of the United States District Court for the District of Minnesota, do hereby certify that I have carefully compared each of the copies, attached to this certificate, with its respective original, which is in my custody as such Clerk, and that each of the said copies is a full, true, and correct transcript from such original and of the whole thereof—

IN TESTIMONY WHEREOF, I have hereunto set my official signature of the Clerk aforesaid and affixed the seal of said court at Duluth, in the Fifth Division of said District, this 29th day of June, A. D. 1927.

JOEL M. DICKEY,
Clerk.
By E. Catherine Neff,
Deputy Clerk.

[Endorsed]: Filed July 5, 1927. [141]

[Endorsed]: Filed July 5, 1927. [142]

[Title of Court and Cause.]

PETITION FOR ORDER CONFIRMING ACTS OF RECEIVERS.

To the Honorable WILLIAM A. CANT, Judge of the United States District Court, District of Minnesota, Fifth Division:

Now come John W. Neukom and Matt L. Essig, receivers herein, duly appointed by order of this Court, dated June 8, 1927, by their solicitor, Warren E. Greene, Esquire, and respectfully petition and represent to this Court that on June 10, 1927, they were duly appointed receivers of the defendant company in ancillary proceedings that day instituted in the United States District Court, District of Montana, and that on said 10th day of June, 1927, they duly qualified as such receivers in said District of Montana; that a large portion of the assets of said defendant company were and are situated in said last-named District; that [143] thereafter the said receivers entered upon the performance of their duties as such receivers, and thereafter and on the 20th day of June, 1927, filed a preliminary report in said District Court of Montana, a copy of which said report has been also duly filed in the above-named United States District Court of Minnesota; that upon assuming their duties, it became necessary for said receivers to take immediate action relative to certain of the business of said defendant; that the matters so

acted upon and the respective actions taken were as follows:

IN RE EMPLOYEES:

At the time of the appointment of said receivers in the District of Montana there were in the employ of the defendant company in said District certain officers and employees, a list of whom with the pay of each appears at page 5 of said Preliminary Report, reference to which is hereby made for greater particularity.

The action taken by the receivers was to discontinue the employment of all such officers and employees as of June 10, 1927, and to employ the following men in the following capacities and at the following pay:

C. M. Cross as Watchman at $75.00 per month;

Tony Thomas as Watchman at $40.00 per month;

John Collins as Watchman at $50.00 per month;

F. C. Ball as Watchman at $4.25 per day;

William Bruyn as Watchman at $4.25 per day;

Ben Favero as Watchman at $4.25 per day;

[144]

George L. Lapp as Fire Chief at $30.00 per month.

The above arrangement with Ball and Bruyn who have been in the employ of the defendant company as foreman-watchman at $250 and $225 per month respectively were made subject to adjustment of any claim they each might have against the Company as a higher rate of pay for the balance of the month of June, to wit:

From June 10, 1927, to June 30, 1927.

IN RE FIRE INSURANCE:

At the time of the appointment of the receivers in the District of Montana certain fire insurance was in force covering properties of the company in the District of Montana, a detailed list of such insurance appearing at Exhibit "D" of the above-mentioned report, reference to which is hereby made for greater particularity, and that certain of the premiums thereon had not been paid.

The receivers arranged with the agents of the various insurance companies represented to continue the policies in force, *pro rating* the unpaid premiums as of June 10, 1927. That is to say, the *pro rata* part of said unpaid premiums from the date of issuance of each of said policies to June 10, 1927, to be treated as a general creditor's claim against the receivership estate, and the *pro rata* part of said unpaid premiums from June 10, 1927, to the date of expiration of each of said policies to be treated as an expense of administration herein.

This arrangement was made because some of the said agents were threatening cancellation of the policies. The *pro rata* part of said unpaid premiums due as administration expense has [145] been paid by said receivers.

IN RE COMPENSATION INSURANCE:

At the date of the appointment of the receivers in the District of Montana, the defendant company was carrying compensation insurance on its employees and on the lessees and their employees.

The action taken was (a) as to the employees of the receivers, arrangements were at once made with

the Montana State Industrial Accident Board to carry compensation insurance for such employees under Plan No. 3; (b) as to the lessees and their employees, the said lessees were at once notified to discontinue operations until they had made similar arrangements with the State Industrial Accident Board; that all liabilities of the company or the receivers for compensation insurance premiums for insurance on the lessees or their employees were discontinued.

IN RE LEASES:

A. At the time of the appointment of the receivers, one, James Wilkie, had an oral contract with the defendant company whereby he had the right to gather up ore around the bins and tracts at the Granite Mountain Mine and ship the same to the smelter, paying therefor to the Company a certain percentage of the net smelter returns as a royalty, and on June 10, 1927, under such agreement, he had about forty (40) tons of copper ore ready for shipment.

The receivers terminated such agreement, but gave the said [146] Wilkie permission to ship the said forty tons of ore and arranged with the smelter to make payment to the receivers for the percentage accruing to the company thereon, said arrangement being covered by letter of June 16, 1927, a copy of which letter is attached hereto and marked Exhibit "A."

B. One, S. O. Shaw, had a similar contract to prospect and mine surface ores at the Sarsfield Mine and had accumulated about six (6) tons of ore.

The receivers took the same action in this matter as in the Wilkie case, which action is covered by letter of June 16, 1927, a copy of which letter is attached hereto and marked Exhibit "B."

C. Evan M. Fraser, A. G. Ray and A. F. Robertson held a written lease from the company dated May 2, 1927, covering the right to mine and ship ore from the Birtha and Copper Queen Claims at the Birtha Mine and ship the same to the smelter, paying therefor to the company a certain percentage of the net returns as a royalty.

On June 11, 1927, the receivers notified the said parties to discontinue operations under said lease, and under date of June 13, 1927, the said parties made application to the receivers by letter for a continuance of said lease. In reply thereto the receivers assented to such continuation of said lease upon the basis and on the conditions and modifications set forth in their letter of June 14, 1927, a copy of which said letter is hereto attached and marked Exhibit "C."

D. One, L. J. Coady and one, L. D. Frink, had a written lease from the company embodied in various letters passing between [147] them and the company covering the right to mine and ship ore from the Sioux Chief Vein to the 1,200 level in the Speculator Mine and to use the Speculator Shaft for hoisting, and to ship the same to the smelter, paying to the company therefor a certain percentage of the net returns as a royalty.

On June 11, 1927, they were notified by the receivers to discontinue operations under said lease,

and under date of June 12, 1927, they made application to the receivers for a continuance of the said lease, stating that conditions were such that if operations were discontinued for even a short time there was grave danger of losing the ore body from which they were shipping. Upon receipt of the foregoing, the receivers caused an examination of the shaft and ground around referred to in said letter to be made by Mr. Ball, a former foreman of the Granite Mountain Mine, and an expert in such matters. The said Ball reported to the receivers by letter, a copy of which said letter is attached hereto and marked Exhibit "D"; thereupon the receivers assented to a continuance of said lease upon the basis and on the conditions and with the modifications set forth in their letter of June 14, 1927, a copy of which said letter is hereto attached and marked Exhibit "E." Said conditions and modifications were accepted by said Coady and Frink and they continued with their operations under said lease as modified.

IN RE HOUSES:

At the time of the appointment of the receivers, the company was the owner of two superintendents' residences adjacent to [148] the Speculator Mine, one of which was occupied by L. J. Coady, above mentioned, rent free, and the other by Matt L. Essig, accountant for the company, and also rent free.

The receivers arranged with the said L. J. Coady to lease the residence occupied by him at a rental of $25.00 per month and arranged with the said

Essig to lease the residence occupied by him at a fair and reasonable rental to be fixed by the Court. The house so occupied by the said Essig is a six-room bungalow, and in the opinion of the receivers $35.00 per month would be a fair and reasonable rental therefor.

All of the said foregoing acts, agreements and arrangements were made subject to the confirmation of the Court herein.

WHEREFORE, said receivers respectfully petition this Court for an order herein confirming each of the several acts, agreements and arrangements performed and made by the said receivers, as aforesaid, and for an order fixing the rental of the premises now occupied by the said Matt L. Essig.

Dated at Duluth, Minnesota, this 1st day of July, A. D. 1927.

JOHN W. NEUKOM,
MATT L. ESSIG,
Receivers.
By WARREN E. GREENE,
Solicitor for the Receivers.

United States of America,
State of Minnesota,
County of St. Louis,—ss.

Warren E. Greene, being first duly sworn, deposes and says [149] that he is solicitor for the receivers in the above-entitled action; that he has read the foregoing petition for order confirming acts of receiver;s that he knows the contents thereof and believes it to be true to the best of his information, knowledge and belief; that the reason

why this affidavit is not made by one of the receivers is that they both absent from the District of Minnesota wherein resides the said colicitor.

WARREN E. GREENE.

Subscribed and sworn to before me this 1st day of July, A. D. 1927.

E. B. NORRIS,
Notary Public, St. Louis County, Minn.
My commission expires March 7th, 1930. [150]

EXHIBIT "A."

JOHN W. NEUKOM AND MATT. L. ESSIG, RECEIVERS.

June 16, 1927.

Mr. James Wilkie,
444 South Wyoming Street,
Butte, Montana.

Dear Sir:

Referring to verbal arrangement between North Butte Mining Company and yourself, giving you the right to clean up ore around the ore bins and tracks at the Granite Mountain Mine, and providing that out of the ores so recovered you are to pay the company a royalty on the following basis:

Under 4%	copper	– 15%	royalty
4 to 5%	"	– 20%	"
5 to 6%	"	– 25%	"
6 to 7%	"	– 30%	"
7 to 8%	"	– 40%	"
8% or over	"	– 50%	"

And confirming the arrangement heretofore made with you as to shipment of the ore so recovered by you and in storage in the ore bins at the Granite Mountain Mine:

Shipment of this ore is being made to-day, car No. 1947, to the Washoe sampler, and as soon as assays are received, we will furnish you with settlement sheet, covering settlement on basis of your arrangement with the company, and the Anaconda Copper Mining Company will make payment direct to you of your share of the proceeds.

It is understood that the verbal arrangement above referred to was terminated as of June 10th, the date of appointment of the undersigned as receivers of North Butte Mining Company.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [151]

EXHIBIT "B."

JOHN W. NEUKON AND MATT L. ESSIG, RECEIVERS.

June 16, 1927.

Mr. S. O. Shaw,
Sarsfield Mine,
Butte, Montana.

Dear Sir:

Referring to verbal arrangement between North Butte Mining Company and yourself giving you permission to prospect for and mine ore on Sarsfield claim:

You have been heretofore advised of the appointment of the undersigned as Receivers of North Butte Mining Company. Please ship the several tons of ore that you have gathered together to the Washoe Sampler in the name of the undersigned as Receivers of North Butte Mining Company. Settlement will be made with you by Sampler after deducting for account of Receivers royalty of 20% of net smelter returns.

As Receivers, we feel that we are without authority to continue the arrangement above referred to without first taking the matter up with the Court.

Very truly yours,

(Signed) JOHN W. NEUKOM,

(Signed) MATT L. ESSIG,

Receivers, North Butte Mining Company. [152]

EXHIBIT "C."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 14, 1927.

Messrs. Evan M. Fraser,
A. G. Ray, A. F. Robertson,
Butte, Montana.

Dear Sirs:

Referring to the lease between the North Butte Mining Company and yourselves, dated May 2, 1927:

We acknowledge receipt of your letter of June 13th, in which you make application for a continuance of the lease.

In view of the fact that, from the information before us, there is a possibility that the shaft may

cave and the underground workings be lost, in the event you are obliged to cease operations, and that the continuance of your operations under the lease will not subject the properties and assets in possession of the undersigned Receivers to any loss, liability or damage, but on the contrary may be of direct benefit to the estate in possession of the Receivers, and that the continuance of your operations will afford protection against loss by theft or otherwise, we hereby assent as such Receivers to a continuance of said lease, subject to confirmation and further order of the United States District Court, District of Montana.

The continuance of said lease shall be effective as of the date that you secure proper protection under Plan No. 3 of the Workmen's Compensation Act of Montana, the arrangement as to such protection to remain in effect during the continuance of the lease. You further agree as such lessees (except as to rights given by the Workmen's Compensation Act of Montana) to indemnify and save harmless the lessor from all loss, expense, claim and demands, actions or causes of action whatsoever arising or growing out of any accident or personal injury sustained by the lessees or any employee of the lessees, from whatsoever cause arising, including the negligence of the lessor, while in or upon the property of the lessor.

Shipments shall be made to the Washoe Sampler, in the names of the undersigned, as receivers of North Butte Mining Company, and settlement there-

for made by them direct to you in accordance with the terms of your lease. [153]

Paragraph 13 of your present lease will be eliminated; you to arrange your own hospital contract. Paragraph 14 as to Workmen's Compensation insurance is modified to the extent herein provided. Paragraph 20 as to the sale of supplies, etc., to you, by the lessor is eliminated, as the Receivers are not in position to carry out this provision of the lease.

For our records please acknowledge receipt of this letter and express your assent to the continuance of said lease on the basis herein stated and to the extent hereby modified.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [154]

EXHIBIT "D."

Butte, Montana, June 14, 1927.

Messrs. Neokum and Essig,
Receivers of North Butte Mining Company.

Dear Sirs:

At your request I visited the lease operated by Coady and Frink through the Speculator shaft, and find the following conditions:

The Speculator shaft is wet from the surface to the 1,200 and in many places has squeezed so tight that the cage will barely pass. Between the 800 and 900 levels the shaft is in the poorest condition, and it is only a matter of time when the shaft

will be closed between these levels. It is necessary for them to do considerable work in the shaft at the present time in order to keep it open enough for the cage to pass. The ore they are mining lies close to the Edith May fault on the west end, and would be considered exceptionally heavy ground. Timber put in last but a few days, making it compulsory to change them constantly and to fill stope with waste as soon as ore is taken out. Will say it is not only advisable but imperative that operations be continued without cessation, otherwise the ore body will be lost.

Respectfully,
(Signed) F. C. BALL,
Former Foreman Granite Mountain. [155]

EXHIBIT "E."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 14, 1927.

Messrs. Leo J. Coady and
L. D. Frink,
Speculator Mine,
Butte, Montana.

Dear Sirs:

Referring to the lease between the North Butte Mining Company and yourselves, as extended by the Company's letter dated December 30, 1926, and modified by the Company's letters of March 9, 1926, and April 1, 1927, and further modified in May, 1927:

We acknowledge receipt of your letter of June 12th, in which you make application for a continuance of the lease. We have had Mr. Frank C. Ball, former foreman of the Company, make an examination of the ground you are working in, and have his written report confirming the statements made in your letter.

In view of the fact that, from the information before us, it appears that the ore body upon which you are now working will be lost in the event you are obliged to cease operations, and that the continuance of your operations under the lease will not subject the properties and assets in possession of the undersigned receivers to any loss, liability or damage, but on the contrary will be of direct benefit to the estate in possession of the receivers, we hereby assent, as such receivers, to a continuance of said lease to and including July 31, 1927, subject to confirmation and further order of the United States District Court, District of Montana,

The continuance of said lease shall be effective as of June 10, 1927, the date of appointment by the United States District Court, District of Montana. of the undersigned as receivers of the North Butte Mining Company. It is understood that you have already arranged with the State Industrial Accident Board of Montana for insurance under Plan No. 3 and that such arrangement shall remain in effect during the continuance of the lease. You further agree, as such lessees (except as to rights given by the Workmen's Compensation Act of Montana) to indemnify and save harmless the les-

sor from all loss, expense, claims and demands, actions or causes of action whatsoever arising or growing out of any accident or personal injury sustained by the [156] lessees or any employe of the lessees, from whatsoever cause arising, including the negligence of the lessor, while in or upon the property of the lessor.

Shipments shall be made to the Washoe Sampler, in the names of the undersigned, as receivers of North Butte Mining Company, and settlement therefor made by them direct to you in accordance with the terms of your lease.

For our records, please acknowledge receipt of this letter and express your consent to the continuance of said lease on the basis herein stated.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [157]

[Endorsed]: Filed July 2d, 1927. [158]

[Title of Court and Cause.]

ORDER CONFIRMING ACTS OF RECEIVERS AND AUTHORIZING LEASE.

The above-entitled matter having this day come on for hearing on the petition of John W. Neukom and Matt L. Essig, receivers herein, dated July 1, 1927, for an order approving and confirming certain acts, agreements and arrangements of said receivers and directing the leasing of a certain house situated in Butte, Montana, and it appear-

ing to the Court that the several acts, agreements and arrangements of said receivers set forth in said petition were and are necessary for the preservation of the receivership estate and for the best interests of the creditors of the defendant company.

IT IS ORDERED, that the several acts, agreements and arrangements of the said receivers set forth and stated in said petition be, and the same hereby are, approved and confirmed; [159] and

IT IS FURTHER ORDERED, that the said receivers be, and they hereby are, authorized to lease to Matt. L. Essig the house now occupied by him at Butte, Montana, at a monthly rental of $35.00.

Dated at Duluth, Minnesota, this 2d day of July, 1927.

By the Court:
WM. A. CANT,
Judge. [160]

[Endorsed]: Filed July 2d, 1927.

Filed July 5, 1927. [161]

United States of America,
District of Minnesota,
Fifth Division,—ss.

I, Joel M. Dickey, Clerk of the United States District Court for the District of Minnesota, do hereby certify that I have carefully compared the copies of petition and order attached to this certificate with their originals, which are in my custody as such Clerk, and that the said copies are full, true and correct transcripts from such originals

and of the whole thereof, and of the endorsement thereon.

IN TESTIMONY WHEREOF, I have hereunto set my official signature as the Clerk aforesaid and affixed the seal of said court at Duluth, in the Fifth Division of said District, this 2d day of July, A. D. 1927.

JOEL M. DICKEY,
Clerk.
By J. E. Herman Engel,
Deputy Clerk. [162]

[Title of Court and Cause.]

PETITION TO AMEND ORDER APPOINTING RECEIVERS.

To the Honorable WILLIAM A. CANT, Judge of the United States District Court, District of Minnesota, Fifth Division:

Now comes the complainant in the above-entitled matter by his solicitor of record herein, and respectfully represents to the Court that from the original order appointing receivers made and filed herein on June 8, 1927, certain words were omitted; that such omission was due solely to inadvertence, mistake and typographical error; that the words so omitted were the words "the defendant or," which words should appear immediately after the word "of," the said word "of" being the first word in the tenth (10th) line of folio 11, on page 4 of said order.

WHEREFORE, the complainant moves the Court for an order herein amending said order appointing receivers by inserting the words "the defendant or" immediately after the word "of" [163] the said word "of" being the first word in the tenth (10th) line of folio 11, on page 4 of said order.

Dated at Duluth, Minnesota, this 30th day of June, A. D. 1927.

WARREN E. GREENE,
Solicitor for Complainant,
800 Alworth Building,
Duluth, Minnesota.

State of Minnesota,
County of St. Louis,—ss.

Warren E. Greene, being first duly sworn, deposes and says that he is solicitor for the complainant in the above-entitled action; that he has read the foregoing petition to amend the order appointing receivers; that he knows the contents thereof and believes it to be true to the best of his information, knowledge and belief; that the reason why this affidavit is not made by the complainant is that he is absent from the District of Minnesota wherein resides the said solicitor.

WARREN E. GREENE.

Subscribed and sworn to before me this 30th day of June, A. D. 1927.

E. B. NORRIS,
Notary Public, St. Louis County, Minn.
My commission expires March 7th, 1930. [164]
[Endorsed]: Filed July 2, 1927. [165]

[Title of Court and Cause.]

ORDER AMENDING ORDER APPOINTING RECEIVERS.

The above complainant, having this day appeared by his solicitor of record before the Honorable William A. Cant, Judge of the above-entitled court, on motion to amend the order appointing receivers made and filed herein on June 8, 1927, by inserting therein certain words; and it appearing to said Court that said words were omitted from said order through inadvertence, mistake and typographical error, and the Court being fully advised in the premises,—

Now, therefore, IT IS ORDERED, that the order appointing receivers entered herein on June 8, 1927, be amended by inserting the words "the defendant or" immediatley after the word "of" which word "of" is the first word in the tenth (10th) line of folio 11, on page 4 of said order. [166]

Dated at Duluth, Minnesota, July 2, 1927.

By the Court:

WM. A. CANT,

Judge.

United States of America,
District of Minnesota,
Fifth Division,—ss.

I, Joel M. Dickey, Clerk of the United States District Court for the District of Minnesota, do hereby certify that I have carefully compared the copies of petition and order attached to this cer-

tificate, with their originals, which are in my custody as such Clerk, and that the said copies are full, true, and correct transcripts from such originals and of the whole thereof, and of the endorsements thereon.

IN TESTIMONY WHEREOF, I have hereunto set my official signature as the Clerk aforesaid and affixed the seal of said court at Duluth, in the Fifth Division of said District, this 2d day of July, A. D. 1927.

JOEL M. DICKEY,
Clerk.
By J. C. Herman Engel,
Deputy Clerk. [167]

[Endorsed]: Filed July 2, 1927.

Filed July 5th, 1927. [168]

THEREAFTER, on July 6, 1927, petition for order confirming acts of receivers, authorizing lease and confirming order was filed herein, which is in the words and figures as follows, to wit:

(Title of Court and Cause.)

PETITION FOR ORDER CONFIRMING ACTS OF RECEIVERS, AUTHORIZING LEASE AND CONFIRMING ORDER.

To the Honorable GEORGE M. BOURQUIN, Judge of United States District Court, District of Montana.

Now come John W. Neukom and Matt L. Essig,

receivers herein, duly appointed by order of the United States District Court, District of Minnesota, June 8, 1927, and by order of this Court in ancillary proceedings dated June 10, 1927, and respectfully petition and represent to this Court that they duly qualified as such receivers in said District of Montana on the 10th day of June, 1927, and thereafter entered upon the performance of their duties as such receivers; and thereafter, on the 20th day of June, 1927, filed a preliminary report in this court, a copy of which said report has also been duly filed in the above-named United States District Court of Minnesota; that upon assuming their duties, it became necessary for the said receivers to take immediate action relative to certain of the business of said defendant company; that the matters so acted upon and the respective actions taken are embodied in a petition to the United States District Court of Minnesota, a copy of which said petition is hereto attached, marked Exhibit 1, and hereby made a part [169] hereof, and to which reference is made for greater particularity.

That the various acts, agreements and arrangements set forth in said Exhibit 1 were made subject to the confirmation of the Court herein; that the said petition, Exhibit 1, was presented to the United States District Court of Minnesota on July 2, 1927; that thereupon the said Court entered its order, a copy of which said order is hereto attached, marked Exhibit 2, and hereby made a part hereof.

WHEREFORE, said receivers respectfully petition this Court for an order herein approving and confirming each of the several acts, agreements and arrangements performed and made by the said receivers, as set forth in said Exhibit 1; for an order fixing the rental of the house now occupied by the said Matt. L. Essig, and confirming the order of the United States District Court, District of Minnesota, made and entered herein on July 2, 1927, and hereto attached as Exhibit 2.

Dated at Butte, Montana, July 5th, 1927.

JOHN W. NEUKOM,
MATT L. ESSIG,
Receivers,
By MATT L. ESSIG,
One of Said Receivers.

WARREN E. GREENE,
800 Alworth Building,
Duluth, Minnesota,
and
EDWIN M. LAMB,
123 Pennsylvania Building,
Butte, Montana,
Solicitors for Receivers. [170]

State of Montana,
County of Silver Bow,—ss.

Matt L. Essig, being first duly sworn, deposes and says that he is one of the receivers in the above-entitled matter; that he has read the foregoing petition for order confirming acts of receivers, authorizing lease and confirming order, and knows the contents thereof; that the same is true of his

own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

MATT L. ESSIG.

Subscribed and sworn to before me this 5th day of July, A. D. 1927.

MICHAEL DONLAN,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires 1st December, 1929. [171]

EXHIBIT No. 1.

In the United States District Court, District of Minnesota, Fifth Division.

245—EQ.

FRANCIS H. HARDY,

Complainant,

against

NORTH BUTTE MINING COMPANY, a Corporation,

Defendant.

PETITION FOR ORDER CONFIRMING ACTS OF RECEIVERS.

To the Honorable WILLIAM A. CANT, Judge of the United States District Court, District of Minnesota, Fifth Division:

Now comes John W. Newkom and Matt L. Essig, receivers herein, duly appointed by order of this Court dated June 8, 1927, by their solicitor, Warren

E. Greene, Esquire, and respectfully petition and represent to this Court, that on June 10, 1927, they were duly appointed receivers of the defendant company in ancillary proceedings that day instituted in the United States District Court, District of Montana, and that on said 10th day of June, 1927, they duly qualified as such receivers in said District of Montana; that a large portion of the assets of said defendant company were and are situated in said last-named District; that [172] thereafter the said receivers entered upon the performance of their duties as such receivers, and thereafter and on the 20th day of June, 1927, filed a preliminary report in said District Court of Montana, a copy of which said report has been also duly filed in the above-named United States District Court of Minnesota; that upon assuming their duties, it became necessary for said receivers to take immediate action relative to certain of the business of said defendant; that the matters so acted upon and the respective actions taken were as follows:

IN RE EMPLOYEES:

At the time of the appointment of said receivers in the District of Montana there were in the employ of the defendant company in said district certain officers and employees, a list of whom with the pay of each appears at page 5 of said Preliminary Report, reference to which is hereby made for greater particularity.

The action taken by the receivers was to discontinue the employment of all such officers and em-

ployees as of June 10, 1927, and to employ the following men in the following capacities and at the following pay:

C. M. Cross as Watchman at $75.00 per month;
Tony Thomas as Watchman at $40.00 per month;
John Collins as Watchman at $50.00 per month;
F. C. Ball as Watchman at $4.25 per day;
William Bruyn as Watchman at $4.25 per day;
Ben Favero as Watchman at $4.25 per day;
[173]
George L. Lapp as Fire Chief at $30.00 per month.

The above arrangement with Ball and Bruyn who have been in the employ of the defendant company as foremen-watchmen at $250 and $225 per month respectively were made subject to adjustment of any claim they each might have against the Company as a higher rate of pay for the balance of the month of June, to wit: From June 10, 1927, to June 30, 1927.

IN RE FIRE INSURANCE.

At the time of the appointment of the receivers in the District of Montana certain fire insurance was in force covering properties of the Company in the District of Montana, a detailed list of such insurance appearing at Exhibit "D" of the above-mentioned report, reference to which is hereby made for greater particularity, and that certain of the premiums thereon had not been paid.

The receivers arranged with the agents of the various insurance companies represented to continue the policies in force, prorating the unpaid

premiums as of June 10, 1927. That is to say, the *pro rata* part of said unpaid premiums from the date of issuance of each of said policies to June 10, 1927, to be treated as a general creditor's claim against the receivership estate, and the *pro rata* part of said unpaid premiums from June 10, 1927, to the date of expiration of each of said policies to be treated as an expense of administration herein.

This arrangement was made because some of the said agents were threatening cancellation of the policies. The *pro rata* part of said unpaid premiums due as administration expense has been [174] paid by said receivers.

IN RE COMPENSATION INSURANCE.

At the date of the appointment of the receivers in the District of Montana, the defendant company was carrying compensation insurance on its employees and on the lessees and their employees.

The action taken was (a) as to the employees of the receivers, arrangements were at once made with the Montana State Industrial Accident Board to carry compensation insurance for such employees under Plan No. 3; (b) as to the lessees and their employees, the said lessees were at once notified to discontinue operations until they had made similar arrangements with the State Industrial Accident Board; that all liabilities of the Company or the receivers for compensation insurance premiums for insurance on the lessees of their employees were discontinud.

IN RE LEASES:

A. At the time of the appointment of the receivers, one, James Wilkie, had an oral contract with the defendant company whereby he had the right to gather up ore around the bins and tracks at the Granite Mountain Mine and ship the same to the smelter, paying therefor to the company a certain percentage of the net smelter returns as a royalty, and on June 19, 1927, under such agreement, he had about forty (40) tons of copper ore ready for shipment.

The receivers terminated such agreement, but gave the said [175] Wilkie permission to ship the said forty tons of ore and arranged with the smelter to make payment to the receivers for the percentage accruing to the company thereon, said arrangement being covered by letter of June 16, 1927, a copy of which letter is attached hereto and marked Exhibit "A."

B. One, S. O. Shaw, had a similar contract to prospect and mine surface ores at the Sarsfield Mine and had accumulated about six (6) tons of ore. The receivers took the same action in this matter as in the Wilkie case, which action is covered by letter of June 16, 1927, a copy of which letter is attached hereto and marked Exhibit "B."

C. Evan M. Fraser, A. G. Ray and A. F. Robertson held a written lease from the company dated May 2, 1927, covering the right to mine and ship ore from the Birtha and Copper Queen Claims at the Birtha Mine and ship the same to the smelter,

paying therefor to the company a certain percentage of the net returns as a royalty.

On June 11, 1927, the receivers notified the said parties to discontinue operations under said lease, and under date of June 13, 1927, the said parties made application to the receivers by letter for a continuance of said lease. In reply thereto the receivers assented to such continuation of said lease upon the basis and on the conditions and modifications set forth in their letter of June 14, 1927, a copy of which said letter is hereto attached and marked Exhibit "C."

D. One, L. J. Coady and one, L. D. Frink, had a written [176] lease from the company embodied in various letters passing between them and the company covering the right to mine and ship ore from the Sioux Chief Vein to the 1,200 level in the Speculator Mine and to use the Speculator shaft for hoisting, and to ship the same to the smelter, paying to the company therefor a certain percentage of the net returns as a royalty.

On June 11, 1927, they were notified by the receivers to discontinue operations under said lease, and under date of June 12, 1927, they made application to the receivers for a continuance of the said lease, stating that conditions were such that if operations were discontinued for even a short time there was grave danger of losing the ore body from which they were shipping. Upon receipt of the foregoing, the receivers caused an examination of the shaft and ground around referred to in said letter to be made by Mr. Ball, a former foreman of the Granite Moun-

tain Mine, and an expert in such matters. The said Ball reported to the receivers by letter, a copy of which said letter is attached hereto and marked Exhibit "D"; thereupon the receivers assented to a continuance of said lease upon the basis and on the conditions and with te modifications set forth in their letter of June 14, 1927, a copy of which said letter is hereto attached and marked Exhibit "E." Said conditions and modifications were accepted by the said Coady and Frink and they continued with their operations under said lease as modified.

IN RE HOUSES: [177]

At the time of the appointment of the receivers, the company was the owner of two superintendents' residences adjacent to the Speculator Mine, one of which was occupied by L. J. Coady, above mentioned, rent free and the other by Matt L. Essig, accountant for the company, and also rent free.

The receivers arranged with the said L. J. Coady to lease the residence occupied by him at a rental of $25.00 per month and arranged with the said Essig to lease the residence occupied by him at a fair and reasonable rental to be fixed by the Court. The house so occupied by the said Essig is a six-room bungalow, and in the opinion of the receivers $35.00 per month would be a fair and reasonable rental therefor.

All of the said foregoing acts, agreements and arrangements were made subject to the confirmation of the Court herein.

WHEREFORE, said receivers respectfully petition this Court for an order herein confirming each

of the several acts, agreements and arrangements performed and made by the said receivers, as aforesaid, and for an order fixing the rental of the premises now occupied by the said Matt L. Essig.

Dated at Duluth, Minnesota, this 1st day of July, A. D. 1927.

JOHN W. NEUKON,
MATT L. ESSIG,
Receivers.
By WARREN E. GREENE,
Solicitors for the Receivers. [178]

United States of America,
State of Minnesota,
County of St. Louis,—ss.

Warren E. Greene, being first duly sworn, deposes and says that he is a solicitor for the receivers in the above-entitled action; that he has read the foregoing petition for order confirming acts of the receivers; that he knows the contents thereof and believes it to be true to the best of his information knowledge and belief; that the reason why this affidavit is not made by one of the receivers is that they are both absent from the District of Minnesota wherein resides the said solicitor.

WARREN E. GREENE.

Subscribed and sworn to before me this 1st day of July, A. D. 1927.

[Notarial Seal—St. Louis County, Minn.]

E. B. NORRIS.
E. B. NORRIS,
Notary Public, St. Louis County, Minn.
My commission expires March 7th, 1930. [179]

EXHIBIT "A."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 16, 1927.

Mr. James Wilkie,
444 South Wyoming Street,
Butte, Montana.

Dear Sir:

Referring to verbal arrangement between North Butte Mining Company and yourself, giving you the right to clean up ore around the ore bins and tracks of the Granite Mountain Mine, and providing that out of the ores so recovered you are to pay the company a royalty on the following basis:

Under 4%	copper	– 15%	royalty
4 to 5%	"	– 20%	"
5 to 6%	"	– 25%	"
6 to 7%	"	– 30%	"
7 to 8%	"	– 40%.	"
8% or over	"	– 50%	"

And confirming the arrangement heretofore made with you as to shipment of the ore so recovered by you and in storage in the ore bins at the Granite Mountain mine:

Shipment of this ore is being made to-day, car No. 1947, to the Washoe sampler, and as soon as assays are received, we will furnish you with settlement sheet, covering settlement on basis of your arrangement with the Company, and the Anaconda Copper Mining Company will make payment direct to you of your share of the proceeds.

It is understood that the verbal arrangement above referred to was terminated as of June 10th, the date of appointment of the undersigned as receivers of North Butte Mining Company.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [180]

EXHIBIT "B."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 16, 1927.

Mr. S. O. Shaw,
Sarsfield Mine,
Butte, Montana.

Dear Sir:

Referring to verbal arrangement between North Butte Mining Company and yourself giving you permission to prospect for and mine ore on Sarsfield claim:

You have been heretofore advised of the appointment of the undersigned as Receivers of North Butte Mining Company. Please ship the several tons of ore that you have gathered together in the Washoe Sampler in the name of the undersigned as Receivers of North Butte Mining Company. Settlement will be made with you by Sampler after deducting for account of Receivers royalty of 20% of net smelter returns.

As Receivers, we feel that we are without author-

ity to continue the arrangement above referred to without first taking the matter up with the Court.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [181]

EXHIBIT "C."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 14, 1927.

Messrs. Evan M. Fraser,
A. G. Ray, A. F. Robertson,
Butte, Montana.

Dear Sirs:

Referring to the lease between the North Butte Mining Company and yourselves, dated May 2, 1927:

We acknowledge receipt of your letter of June 13th, in which you make application for a continuance of the lease.

In view of the fact that, from the information before us, there is a possibility that the shaft may cave and the underground workings be lost, in the event you are obliged to cease operations, and that the continuance of your operations under the lease will not subject the properties and assets in possession of the undersigned Receivers to any loss, liability or damage, but on the contrary may be of direct benefit to the estate in possession of the Receivers, and that the continuance of your operations will afford protection against loss by theft or other-

wise, we hereby assent as such Receivers to a continuance of said lease, subject to confirmation and further order of the United States District Court, District of Montana.

The continuance of said lease shall be effective as of the date that you secure proper protection under Plan No. 3 of the Workmen's Compensation Act of Montana, the arrangement as to such protection to remain in effect during the continuance of the lease. You further agree as such lessees (except as to rights given by the Workmen's Compensation Act of Montana) to indemnify and save harmless the lessor from all loss, expense, claim and demands, actions or causes of action whatsoever arising or growing out of any accident or personal injury sustained by the lessees or any employe of the lessees, from whatsoever cause arising, including the negligence of the lessor, while in or upon the property of the lessor.

Shipments shall be made to the Washoe Sampler, in the names [182] of the undersigned, as Receivers of North Butte Mining Company, and settlement therefor made by them direct to you in accordance with the terms of your lease.

Paragraph 13 of your present lease will be eliminated; you to arrange your own hospital contract. Paragraph 14 as to Workmen's Compensation insurance is modified to the extent herein provided. Paragraph 20 as to the sale of supplies, etc., to you, by the lessor is eliminated, as the Receivers are not in position to carry out this provision of the lease.

For our records please acknowledge receipt of this letter and express your assent to the continuance of said lease on the basis herein stated and to the extent hereby modified.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [183]

EXHIBIT "D."

Butte, Montana, June 14, 1927.

Messrs. Neukom and Essig,
Receivers of North Butte Mining Company.

Dear Sirs:

At your request I visited the lease operated by Coady and Frink through the Speculator shaft, and find the following conditions:

The Speculator shaft is wet from the surface to the 1200 and in many places has squeezed so tight that the cage will barely pass. Between the 800 and 900 levels the shaft is in the poorest condition, and it is only a matter of time when the shaft will be closed between these levels. It is necessary for them to do considerable work in the shaft at the present time in order to keep it open enough for the cage to pass. The ore they are mining lies close to the Edith May fault on the west end, and would be considered exceptionally heavy ground. Timbers put in last but a few days, making it compulsory to change them constantly and to fill stope with waste as soon

as ore is taken out. Will say it is not only advisable but imperative that operations be continued without cessation, otherwise the ore body will be lost.

Respectfully,
(Signed) F. C. BALL,
Former Foreman Granite Mountain. [184]

EXHIBIT "E."

JOHN W. NEUKOM AND MATT L. ESSIG, RECEIVERS.

June 14, 1927.

Messrs. Leo. J. Coady and
L. D. Frink,
Speculator Mine,
Butte, Montana.

Dear Sirs:

Referring to the lease between the North Butte Mining Company and yourselves, as extended by the Company's letter dated December 30, 1926, and modified by the Company's letters of March 9, 1926, and April 1, 1927, and further modified in May, 1927:

We acknowledge receipt of your letter of June 12th, in which you make application for a continuance of the lease. We have had Mr. Frank C. Ball, former foreman of the Company, make an examination of the ground you are working in, and have written report confirming the statements made in your letter.

In view of the fact that, from the information

before us, it appears that the ore body upon which you are now working will be lost in the event you are obliged to cease operations, and that the continuance of your operations under the lease will not subject the properties and assets in possession of the undersigned receivers to any loss, liability or damage, but on the contrary will be of direct benefit to the estate in possession of the receivers, we hereby assent, as such receivers, to a continuance of said lease to and including July 31, 1927, subject to confirmation and further order of the United States District Court, District of Montana.

The continuance of said lease shall be effective as of June 10, 1927, the date of appointment by the United States District Court, District of Montana, of the undersigned as receivers of the North Butte Mining Company. It is understood that you have already arranged with the State Industrial Accident Board of Montana for insurance under Plan No. 3 and that such arrangement shall remain in effect during the continuance of the lease. You further agree, as such lessees (except as to rights given by the Workmen's Compensation Act of Montana) to indemnify and save harmless the lessor from all loss, expense, claims and demands, actions or causes of actions whatsoever arising or growing out of any accident or personal injury sustained by the lessees or any employee of the lessees, from whatsover cause arising, including [185] the negligence of the lessor, while in or upon the property of the lessor.

Shipments shall be made to the Washoe Sampler, in the names of the undersigned, as receivers of North Butte Mining Company, and settlement therefor made by them direct to you in accordance with the terms of your lease.

For our records, please acknowledge receipt of this letter and express your consent to the continuance of said lease on the basis herein stated.

Very truly yours,
(Signed) JOHN W. NEUKOM,
(Signed) MATT L. ESSIG,
Receivers, North Butte Mining Company. [186]

EXHIBIT No. 2.

In the United States District Court, District of Minnesota, Fifth Division.

245—EQ.

FRANCIS H. HARDY,

Complainant,

against

NORTH BUTTE MINING COMPANY, a Corporation,

Defendant.

ORDER CONFIRMING ACTS OF RECEIVERS AND AUTHORIZING LEASE.

The above-entitled matter having this day come on for hearing on the petition of John W. Neukom and Matt L. Essig, receivers herein, dated July 1, 1927, for an order approving and confirming certain

acts, agreements and arrangements of said receivers and directing the leasing of a certain house situated in Butte, Montana, and it appearing to the Court that the several acts, agreements and arrangements of said receivers set forth in said petition were and are necessary for the preservation of the receivership estate and for the best interests of the creditors of the defendant company.

IT IS ORDERED, that the several acts, agreements and arrangements of the said receivers set forth and stated in [187] said petition be, and the same hereby are, approved and confirmed; and

IT IS FURTHER ORDERED, that the said receivers be, and they hereby are, authorized to lease to Matt. L. Essig the house now occupied by him at Butte, Montana, at a monthly rental of $35.00.

Dated at Duluth, Minnesota, this 2d day of July, 1927.

By the Court:
WM. A. CANT,
Judge.

[Endorsed]: Filed July 6, 1927.

THEREAFTER, on July 6, 1927, a proposed order confirming acts of receivers, authorizing lease and confirming order was submitted to the Court, and being in the words and figures as follows, to wit: [188]

(Title of Court and Cause.)

ORDER CONFIRMING ACTS OF RECEIVERS, AUTHORIZING LEASE AND CONFIRMING ORDER.

The above-entitled matter having this day come on for hearing on petition of John W. Neukom and Matt L. Essig, receivers herein, dated July 5th, 1927, for an order approving and confirming certain acts, agreements and arrangements of said receivers, directing a lease of a certain house situated in Butte, Montana, and confirming the order of the United States District Court, District of Minnesota, dated July 2, 1927, and it appearing to the Court that the several acts, agreements and arrangements of said receivers set forth in said petition were and are necessary for the preservation of the receivership estate and for the best interests of the defendant company.

IT IS ORDERED, that the several acts, agreements and arrangements of said receivers set forth and stated in said petition be, and the same hereby are, approved and confirmed; and

IT IS ORDERED, that the said receivers be, and they hereby are, authorized to lease to Matt L. Essig, at a monthly rental of $35.00, that certain house now occupied by the said Essig, in Butte, Montana; and

IT IS FURTHER ORDERED, that the order confirming the acts of the receivers and authorizing the lease, made and entered by the United States District Court, District of Minnesota, on

July 2, 1927, be and the same hereby is approved [189] and confirmed.

Dated at Butte, Montana, July ——, 1927.

By the Court:

_____,

Judge.

THEREAFTER, on July 9, 1927, an order to show cause was duly issued herein, and being in the words and figures as follows, to wit: [190]

(Title of Court and Cause.)

ORDER TO SHOW CAUSE.

Herein, it appearing to the Court that the bill of complaint is without equity, that no valid ground is alleged which warrants the Court to engage in operating mining property of defendant as it now is, or to impede any creditor in collection of *any his* claim, IT IS ORDERED that on July 13, 1927, 9:30 A. M., the parties show cause if any they have,

(1) Why the order heretofore made appointing a receiver be not vacated for that it was mistakenly and improvidently made or/and

(2) Why the receivership should not end and the suit be dismissed forthwith.

July 9, 1927.

BOURQUIN, J.

[Endorsed]: Filed July 9, 1927.

THEREAFTER, on July 13, 1927, hearing on order to show cause was had, which record of hearing is in the words and figures as follows, to wit: [191]

No. 509.

FRANCIS H. HARDY

vs.

NORTH BUTTE MINING CO.

HEARING ON ORDER TO SHOW CAUSE.

This cause came on regularly this day for hearing on the order to show cause heretofore made and entered herein, and returnable this day, E. M. Lamb, Esq., appearing for the plaintiff, and Carl J. Christian, Esq., appearing for defendant.

Thereupon, on motion of E. M. Lamb, Esq., Court ordered that Warren E. Greene, Esq., of Duluth, Minnesota, be admitted to practice for the purposes of this case and his name entered as additional counsel for plaintiff.

Thereupon the cause was duly argued by Mr. Greene, attorney for plaintiff, whereupon the matter was submitted to the Court.

Thereupon, after due consideration, Court ordered that the receivers herein be discharged and that the proceedings be and are dismissed, and that said receivers file a report and accounting herein within ten days. Court stated that it would later file a written decision herein.

Thereupon, on motion of Mr. Lamb, the exception of plaintiff to the ruling of the Court was duly noted.

Entered in open court July 13, 1927.

C. R. GARLOW,
Clerk.

THEREAFTER, on July 25, 1927, decision of the court was duly filed herein, and being in the words and figures as follows, to wit: [192]

(Title of Court and Cause.)

DECISION OF COURT.

This is one of those too common receiverships which with like improvident injunctions are in abuse of the powers of the courts, work injustice, visit scandal and reproach upon the judiciary, and incite the storms of judicial recall which persistently lower along the political horizon.

June 8, 1927, in behalf of himself and all who might join, plaintiff filed original complaint in the Federal Court at Duluth, alleging he is a citizen of Illinois and owner of defendant's three months' note for $6,500 unpaid at maturity June 1, 1927.

Other allegations are on information and belief as follows: That defendant is a Minnesota mining corporation having its principal place of business in Duluth; that it owns 1,361 acres of mines at Butte and of the value of more than $8,500,000, $50,000 of cash and accounts receivable and $100,000 of other personal property; that its debts are

$500,000 of bonds, $75,000 of notes, and $76,000 of current liabilities; that for many years defendant extensively and profitably operated, but at the present time it is mining 3,700 tons of ore a month at a loss owing to the prevailing low prices of metals; that all interest due on the bonds has been paid, but though in 1926 defendant paid or "retired" $155,000 of the bonds, defendant has not and cannot [193] secure money to pay $115,000 of the bonds past due, and its other obligations due and accruing; that many creditors are threatening suit, and actions at law may be by them instituted, irrequitable preferences secured, to the irreparable damage of creditors and 6,000 stockholders of defendant. The prayer is a receivership of plenary powers, operation of the mines and sale and distribution of all assets, dissolution and winding up of defendant.

At the same time and place were filed two documents, one purporting to be defendant's answer "submitting" to jurisdiction and admitting the allegations of the complaint, and one purporting to be its consent to the "appointment—of John W. Neukom of Duluth, and Matt L. Essig of Butte, as receivers." These documents are signed "North Butte Mining Company by Frederic R. Kennedy, Secretary."

Thereupon in acceptance of the qualified consent, the Court appointed the receivers so stipulated, with full powers to operate, manage and administer defendant's property, to employ counsel, and as a first lien upon said property to issue $150,000 of re-

ceiver's certificates of indebtedness, but only $25,000 thereof without further order of the court.

In the *mesne* time, both Judges for the District of Montana were absent from that jurisdiction, and before said complaint was filed as aforesaid, one of them in Chicago was inspired to request some other Judge be appointed to hear the instant ancillary proceeding; and to that end and on June 7, 1927, one of the Federal Judges of Oregon was appointed to appear in Butte, with [194] understanding that he would do so on June 10, 1927, as he did. At the latter time and place these ancillary proceedings were instituted on like complaint and answer and the receivers aforesaid by an order like to that aforesaid were likewise herein appointed. In neither court were any conditions imposed upon or bond required from plaintiff.

July 6, 1927, this Court, the writer presiding, was moved by plaintiff's counsel, then also the receivers' counsel, to confirm certain of the receivers' acts. Thus advised of the premises of its own motion the Court on July 10 ordered the parties to show cause why (1) the order of appointment should not be vacated for that it was improvidently made, or/and (2) the receivership should not be terminated and the suit dismissed, for that the complaint is without equity, and alleges no valid ground warranting the Court to hold or operate defendant's mines or to impede any creditor in prosecution of his claims.

At the hearing the parties limited themselves to the argument of plaintiff's counsel that the com-

plaint discloses insolvency and suits and unequal recoveries likely sufficient to support the receivership.

It is noted that plaintiff verified the original complaint on June 3, 1927, and in Illinois; that Warren E. Greene, of the Alwarth Building, Duluth, is his counsel; that Kennedy verified the answer and consent on June 8, 1927, in Duluth, and William E. Tracy of the building aforesaid is defendant's counsel; that very expeditiously and on June 10, 1927, Green, Kennedy and Neukom [195] appeared in the proceedings in Butte; and that Essig is a $300 per month clerk in defendant's Butte office.

If it be granted that these questionable pleadings disclose insolvency, that does not suffice to invoke equitable jurisdiction and receivership at the suit of a simple contract creditor.

Lion etc. Co. vs. Kratz, 262 U. S. 77.

In so far as defendant's consent is relied upon and might serve, be the Court amiable and ambitious to embark upon a mining venture, it is sham and void upon its face in that a corporate secretary has no authority to thus displace the officers and management chosen by stockholders, and to thus pave the way for corporate death.

Passing that, however, the complaint is altogether wanting in substance and too unreliable to justify the Court to oust the corporate management and itself take over and operate the corporation's properties to hinder and delay creditors.

In no just sense is there insolvency when as here the assets exceed liabilities some fourteen times or near $8,000,000, the corporation for many years has been of honest, efficient and profitable operation, even though maybe some present inability by reason of low current values of minerals produced to promptly pay debts due.

And so far as threatened suits are concerned, it will be proper time to take them into account when if ever they materialize, rather than to accept this plaintiff's information and belief in attempted excuse of his own precipitancy even if in a [196] rate to be first,—for what, the emoluments of a receivership?

So far, no other suit has been brought, no one has joined plaintiff. Moreover, there is nothing to warrant the Court to hinder and delay any creditor of defendant. Receiverships are extraordinary remedies, too often abused and made ordinary.

It is a serious matter for a Court to oust owners, and possess and operate their properties by the hand, arm, agent or receiver of the Court. The Court's discretion to that end should be exercised only on a strong showing in *bona fide* and genuine litigation, when absolutely necessary to preserve property for those who may ultimately be proven to be entitled to it.

Corporations are not entitled to receiverships save where persons would be; and neither are at liberty to invoke receivership merely to stay creditors' actions which might be embarrassing to gain a

breathing spell when debts are pressing and money scarce.

The instant case lacks the necessary elements aforesaid.

On the contrary, the suit is friendly and lacks good faith, presents no issue for litigation, is obviously collusive between an amiable creditor and *quasi* "dummy" plaintiff, and some faction of the corporation to gain some inequitable advantage and to accomplish some ulterior purpose.

Often in like cases, the strategy is to procure some complaisant small creditor to pose as a friendly plaintiff, to provide him with counsel from defendant's staff, to secure stranger counsel for defendant, to suggest other of defendant's [197] counsel for receivers, and to extend the activities of plaintiff's counsel to embrace like service for the receivers. It would be at least interesting to know how fully that strategy applies to the instant case. Here, Kennedy or defendant virtually dictated whom the courts should appoint for their own hand, arm, agent, receiver. For the consent of Kennedy or defendant and without which was no equity jurisdiction to appoint receivers, was conditioned upon the appointment of these receivers by Kennedy named.

No court should be thus coerced, but should exercise its discretion. And why should any of those whose administration has involved the corporation in difficulties be trusted by the Court as its agent and best able to extricate the corporation there-

from? Why should courts so generally sign on the dotted line?

Plaintiff has an adequate remedy at law. This tender solicitude for others may be affecting but appeals none to a court of equity, and "an onion holds the tears which should water his grief." In the very beginning, his comparatively small claim imposes costs and expenses which will exceed it many times. In this, no equity appears. Already $150,000 receivers' certificates are authorized and who knows how much more might be required? For receiverships as jobs, life work and careers fairly clutter up the courts, drag on like Jarndyce vs. Jarndyce, enrich participants, consume estates, and defeat justice.

See Penner's Case, 293 Fed. 766. [198]

These certificates to carry on business are not a prior lien to the bonds, despite the Courts' orders that they will be. The orders are void.

See Nowell vs. Co., 169 Fed. 505.

In respect to comity, it cannot impose a burdensome and inequitable receivership on any court, nor require that it be perpetuated. Comity always yields to sound discretion and justice. At most, it stands not in the way of an order terminating a receivership.

The receivers are discharged, the suit is dismissed, and the receivers ordered to render final account and report herein within ten days.

July 13, 1927.

BOURQUIN, J.

[Endorsed]: Filed July 25, 1927.

THEREAFTER, on August 19, 1927, petition for appeal was filed herein, and being in the words and figures as follows, to wit: [199]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit:

The petitioner, Francis H. Hardy, conceiving himself aggrieved by the order and decree of the District Court of the United States for the District of Montana, made July 13, 1927, and filed on July 25, 1927, wherein it was ordered, adjudged and decreed that the receivers in this proceeding be discharged and the suit be dismissed, does hereby appeal from said order and decree thus entered and filed July 25, 1927, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit; and petitioner files herewith his assignment of errors asserted and intended to be urged by him on this his appeal, [200]

And the petitioner prays that this his petition for appeal, and the said appeal, may be granted and allowed and that citation issue herein as provided by law, and that an order be made fixing the amount of the bond to be given by petitioner upon appeal; and that a transcript of the record, proceedings and papers upon which said order and decree was made and entered, duly authenticated, may be sent

to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner desiring to supersede the execution of said order and decree so appealed from, tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

Dated August 17, 1927.

WARREN E. GREENE,
800 Alworth Bldg.,
Duluth, Minnesota.
PATRICK E. GEAGAN,
Silver Bow Block,
Butte, Montana.
CAREY & KERR and
CHARLES A. HART,
Yeon Building,
Portland, Oregon,
Solicitors for Complainant and Appellant.

[Endorsed]: Filed Aug. 19, 1927. [201]

THEREAFTER, on August 19, 1927, assignment of errors was duly filed herein, and being in the words and figures as follows, to wit:

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

To the Honorable W. B. GILBERT, Judge of United States Circuit Court of Appeals for the Ninth Circuit.

Now comes Francis H. Hardy, the complainant in

the above-entitled action, and files the following assignment of errors upon which to rely upon his prosecution of the appeal in the above-entitled action from the order made July 13, 1927, and filed herein by this Honorable Court on July 25, 1927, dismissing the complainant's suit and discharging the receivers herein, and says that the District Court erred as follows:

1. In making and filing its order dated July 13, 1927, dismissing the suit and discharging the receivers herein.

2. In holding that suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is without equity, such holding being contrary to the facts and the law.

3. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground warranting the court to hold or operate defendant's mines, such finding being contrary [202] to the facts and the law.

4. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground to impede any creditor in the prosecution of his claim, such holding being contrary to the facts and the law.

5. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the consent of the

defendant is sham and void upon its face, such holding being contrary to the facts and the law.

6. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is wanting in substance and is too unreliable to justify the Court to oust the corporate management and to take over and operate the properties, such holding being contrary to the facts and the law.

7. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because insolvency is not shown, such holding being contrary to the facts and the law.

8. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because there is nothing to warrant the Court to hinder and delay creditors, such holding being contrary to the facts and the law.

9. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same [203] because the case is not *bona fide* and genuine litigation, such holding being contrary to the facts and the law.

10. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because corporations are not entitled to receivership save where persons would be, such holding being contrary to the facts and the law.

11. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the suit lacks good faith and is collusive between the complainant and a faction of defendant corporation to gain some inequitable advantage and accomplish some ulterior purpose, such holding being contrary to the facts and the law.

12. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because of the comparatively small amount of complainant's claim, such holding being contrary to the facts and the law.

13. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same upon all other grounds, if any, upon which the Court based its decision in holding that this suit should be dismissed, said holding being contrary to the facts and the law.

14. That the order is contrary to law.

15. In assuming and exercising authority to hear and determine the question of whether the complaint is without equity, such hearing and determination being in excess of the authority of [204] said court, the question having been theretofore heard and determined by said court, another Judge sitting, and said question being *res judicata* in said court.

16. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to hold and operate the defendant's mines,

such hearing and determination being in excess of the authority of said court, the question having been theretofore heard and determined by said court, another Judge sitting, and such question being *res judicata* in said court.

17. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to impede any creditor in the prosecution of his claim, such hearing and determination being in excess of the authority of said court, such question having been theretofore heard and determined by said court, another Judge sitting, and such question being *res judicata* in said court.

18. In ordering the complainant to show cause why said suit should not be dismissed because the complaint is without equity and alleges no valid ground warranting the court to hold and operate the defendant's mines or impede any creditor in the prosecution of his claim, such order being in excess of the authority of the said court, such question having been theretofore heard and determined by said court, another Judge sitting, and such question being *res judicata* in said court. [205]

19. In ordering, on the Court's own motion, the complainant to show cause why his suit should not be dismissed, said order being in excess of the authority of said Court.

20. In ordering, on the Court's own motion, the complainant to show cause why his suit should not be dismissed, such order being an abuse of the discretion of said Court.

21. In making and entering its order dismissing the complainant's suit, such order being an abuse of the discretion of the said Court.

22. In making and entering its order dismissing the complainant's suit, such order being in violation of judicial comity.

WHEREUPON, complainant prays that the order dated July 13, 1927, be reversed.

Dated August 17, 1927.

WARREN E. GREENE,
801 Alworth Building,
Duluth, Minnesota,
PATRICK E. GEAGAN,
Silver Bow Block,
Butte, Montana,
CAREY & KERR and
CHARLES A. HART,
Yeon Building,
Portland, Oregon,
Solicitors for Complainant and Appellant.

[Endorsed]: Filed August 19, 1927. [206]

THEREAFTER, on August 24, 1927, order allowing appeal was filed herein, and being in the words and figures as follows, to wit:

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Complainant having heretofore duly filed in this cause his petition praying that an appeal be allowed

him herein from that certain order and decree of the District Court of the United States for the District of Montana, made July 13, 1927, and filed July 25, 1927, and for the reversal of said order and decree; and the said petitioner having duly filed herein an assignment of errors relied upon and intended to be urged by it upon said appeal, and it appearing that the petitioner is entitled to said appeal; now, therefore, on application of Charles A. Hart, Esquire, of counsel for petitioner,

IT IS ORDERED, that the petition of said Francis H. Hardy praying that an appeal be allowed him from that certain order and decree of the District Court of the United States for the District of Montana, dated July 13, 1927, and filed July 25, 1927, be and the same is hereby allowed.

IT IS FURTHER ORDERED, that the bond for the purpose of the appeal, and also for the purpose of a supersedeas herein, shall be in the sum of One Thousand Dollars.

IT IS FURTHER ORDERED, that upon the execution of a bond in the amount hereinabove specified, said appeal shall operate as [207] a supersedeas of the order and decree appealed from, and shall suspend until said appeal shall have been disposed of by said Circuit Court of Appeals, the effect of said order and decree dated July 13, 1927, and filed July 25, 1927.

Dated this 19th day of August, 1927.

WM. B. GILBERT,

Judge of the Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: Filed August 24, 1927.

THEREAFTER, on August 24, 1927, bond on appeal was filed herein, and being in the words and figures as follows, to wit: [208]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Francis H. Hardy, as principal, and American Surety Company of New York, as surety, acknowledge ourselves to be jointly indebted to North Butte Mining Company, appellee in the above case, in the sum of One Thousand Dollars, conditioned that:

WHEREAS, on the 13th day of July, 1927, in the District Court of the United States for the District of Montana, in a suit pending in that court wherein Francis H. Hardy was complainant and North Butte Mining Company was defendant, numbered on the Equity Docket as 509, an order dismissing this suit and discharging the receivers was rendered against the said Francis H. Hardy, and the said Francis H. Hardy having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the said Court to reverse the said order, and a citation directed to the said North Butte Mining Company citing and admonishing it to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, California, thirty days from and after the date of said citation.

Now, if the said Francis H. Hardy shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated Portland, Oregon, August 19, 1927. [209]

FRANCIS H. HARDY.
By C. A. HART,
His Attorney.

AMERICAN SURETY COMPANY OF NEW YORK.
By W. A. KING,
Resident Vice-President.
Attest: H. DE FRANCY,
Resident Assistant Secretary.

The foregoing bond is approved to operate as a supersedeas.

Dated August 19, 1927.

WM. B. GILBERT,
Judge of United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed August 24, 1927.

THEREAFTER, on August 19, 1927, citation on appeal was duly issued herein, and on August 24, 1927, said citation was duly filed herein, and being in the words and figures as follows, to wit: [210]

[Title of Court and Cause.]

CITATION.

United States of America to North Butte Mining Company, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, California, thirty (30) days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the United States District Court for the District of Montana wherein Francis H. Hardy is appellant and you are appellee to show cause, if any there be, why the order rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 19th day of August, A. D. 1927.

WM. B. GILBERT,
Judge of United States Circuit Court of Appeals for the Ninth Circuit.

Service of copy of the foregoing citation in the above-entitled cause acknowledged this 24 day of August, A. D. 1927.

C. J. CHRISTIAN,
Solicitor for Defendant and Appellee. [211]

[Endorsed]: Filed August 24th, 1927. [212]

THEREAFTER, on August 24, 1927, praecipe for transcript on appeal was filed herein, and being in the words and figures as follows, to wit:

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore allowed by said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Order of Judge Gilbert designating Judge McNary to hear the cause:
2. Certified copies of proceedings in primary suit of Francis H. Hardy vs. North Butte Mining Company, in the United States District Court, District of Minnesota, as follows:
   - (a) Bill of complaint.
   - (b) Answer of defendant.
   - (c) Consent of defendant.
   - (d) Order appointing receivers.
   - (e) Petition for instructions with respect to payment of interest.
   - (f) Order with respect to payment of interest.
   - (g) Petition for order confirming acts of receivers.
   - (h) Order confirming acts of receivers.

3. Bill of complaint in ancillary action [213] in United States District Court, District of Montana, omitting Exhibits "A" and "B," incorporating in place of such exhibits the following:

   (Note: Exhibits "A" and "B" being copies of the bill of complaint and order in the primary suit of Francis H. Hardy vs. North Butte Mining Company, certified copies of which are incorporated in this record, reference is hereby made thereto.)
4. Answer of defendant.
5. Clerk's record of hearing on June 10, 1927, before Judge McNary, showing appearances for the parties.
6. Order of Judge McNary appointing receivers dated June 10, 1927.
7. Receivers' bond and approval thereof.
8. Acceptance and oath of receivers.
9. Preliminary report of Receivers John W. Neukom and Matt L. Essig, filed June 18, 1927.
10. Petition for order confirming acts of receivers.
11. Proposed order confirming acts of receivers.
12. Order to show cause dated July 9, 1927.
13. Clerk's record of hearing on order, July 13, 1927.
14. Final order and opinion of the court.
15. Petition on appeal and allowance thereof.
16. Assignment of errors.
17. Bond on appeal and approval by court.

18. Citation with admission of service.
19. Praecipe with admission of service. [214]
20. Notice of filing of praecipe with admission of service.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 19, 1927.

WARREN E. GREENE,
801 Alworth Building,
Duluth, Minnesota,
PATRICK E. GEAGAN,
Silver Bow Block,
Butte, Montana,
CAREY & KERR and
CHARLES A. HART,
Yeon Building
Portland, Oregon,
Solicitors for Complainant and Appellant.

Service of copy of the foregoing directions to the Clerk of said court for making up the transcript of the record on appeal in said cause acknowledged this 24th day of August, A. D. 1927.

C. J. CHRISTIAN,
Solicitor for Defendant and Appellee.

[Endorsed]: Filed August 24, 1927. [215]

THEREAFTER, on August 24, 1927, notice of filing of praecipe was filed herein, and being in the words and figures as follows, to wit:

(Title of Court and Cause.)

NOTICE OF FILING OF PRAECIPE FOR TRANSCRIPT OF RECORD.

To Carl J. Christian, Solicitor for Defendant and Appellee, Butte, Montana:

Sir: PLEASE TAKE NOTICE, that on the 24th day of August, A. D. 1927, the undersigned filed with the Clerk of the above-entitled court a praecipe for the record herein to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, on the appeal in the above-entitled cause, a copy of which praecipe is herewith served upon you.

Dated August 19, 1927.

WARREN E. GREENE,
801 Alworth Building,
Duluth, Minnesota,
PATRICK E. GEAGAN,
Silver Bow Block,
Butte, Montana,
CAREY & KERR and
CHARLES A. HART,
Yeon Building,
Portland, Oregon,
Solicitors for Complainant and Appellant. [216]

Service of copy of the foregoing notice of filing of praecipe in the above-entitled cause acknowledged this 24th day of August, A. D. 1927.

C. J. CHRISTIAN,
Solicitor for Defendant and Appellee.

[Endorsed]: Filed August 24, 1927. [217]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 218 pages, numbered consecutively from 1 to 218, inclusive, is a true and correct transcript of the record and proceedings had in the within entitled cause, and the whole thereof required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-one and 10/100 Dollars ($31.10), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Butte, Montana, this 13th day of December, A. D. 1925.

[Seal]

C. R. GARLOW,
Clerk as Aforesaid.
By L. R. Polglase,
Deputy Clerk. [218]

[Endorsed]: No. 5272. United States Circuit Court of Appeals for the Ninth Circuit. Francis H. Hardy, Appellant, vs. North Butte Mining Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed September 15, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Frank H. Schmid,
Deputy Clerk.

No. 5272

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRANCIS H. HARDY
Appellant

vs.

NORTH BUTTE MINING COMPANY,
a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Montana

Brief for Appellant

WARREN E. GREENE
MESSRS. CAREY AND KERR and CHARLES A. HART
P. E. GEAGAN
Attorneys for Appellant

No. 5272

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRANCIS H. HARDY
Appellant

vs.

NORTH BUTTE MINING COMPANY,
a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Montana

Brief for Appellant

STATEMENT OF THE CASE

This is a suit in the nature of a creditor's bill praying for the appointment of a receiver or receivers of the property of the defendant company, and for the appropriation of the assets of the company to the satisfaction and demand of the complainant and other creditors, complainant acting for himself and for all other creditors of the defendant company. Complainant is a simple creditor, but contemporaneously with the filing of the complaint an an-

swer was filed on behalf of the defendant company admitting the allegations of the bill and consenting to the appointment of receivers, thus bringing the case within the rule of *In re Reisenberg,* 208 U. S. 90, *Holins vs. Brierfield,* 150 U. S. 371, *Brown vs. Lake Superior Iron Company,* 134 U. S. 530.

Original proceedings of the same kind had theretofore been taken in the District Court of the United States for the District of Minnesota, Fifth Division, the present case being ancillary. The greater part of the property of the defendant company is located in Montana.

On June 10, 1927, an order appointing receivers was made herein by the Honorable John H. McNary, he having been designated to sit in the absence of the District Judges for the District of Montana. The receivers thereupon qualified and entered into the discharge of their duties. Both had theretofore been appointed and had qualified in the original suit in the District Court of the United States for the District of Minnesota, Fifth Division.

Thereafter and on July 7, 1927, there was presented in the proceeding a preliminary report of the receivers, together with a petition asking for confirmation of the steps thus far taken by the receivers, and for authority to withhold payment of interest about to fall due on certain obligations of the defendant company. Thereupon the District Court,

(Honorable George M. Bourquin sitting) upon his own motion, made and entered an order requiring that the parties show cause on July 13, 1927, why the order theretofore made appointing receivers should not be vacated and the suit dismissed. Complainant appeared at the time directed and made his showing. Thereafter and on July 25, 1927, the District Court (Honorable George M. Bourquin) handed down and filed an opinion accompanied by an order discharging the receivers and dismissing the suit. The case comes here upon appeal from this order.

ASSIGNMENTS OF ERROR

The District Court erred as follows:

1. In making and filing its order dated July 13, 1927, dismissing the suit and discharging the receivers herein.

2. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is without equity, such holding being contrary to the facts and the law.

3. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground warranting the court to hold or operate defendant's mines, such finding being contrary to the facts and the law.

4. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground to impede any creditor in the prosecution of his claim, such holding being contrary to the facts and the law.

5. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the consent of the defendant is sham and void upon its face, such holding being contrary to the facts and the law.

6. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is wanting in substance and is too unreliable to justify the court to oust the corporate management and to take over and operate the properties, such holding being contrary to the facts and the law.

7. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because insolvency is not shown, such holding being contrary to the facts and the law.

8. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because there is nothing to warrant the court to hinder and delay creditors, such holding being contrary to the facts and the law.

9. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the case is not bona fide and genuine litigation, such holding being contrary to the facts and the law.

10. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because corporations are not entitled to receivership save where persons would be, such holding being contrary to the facts and the law.

11. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the suit lacks good faith and is collusive between the complainant and a faction of defendant corporation to gain some inequitable advantage and accomplish some ulterior purpose, such holding being contrary to the facts and the law.

12. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because of the comparatively small amount of complainant's claim, such holding being contrary to the facts and the law.

13. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same upon all other grounds, if any, upon which the court based its decision in holding

that this suit should be dismissed, said holding being contrary to the facts and the law.

14. That the order is contrary to law.

15. In assuming and exercising authority to hear and determine the question of whether the complaint is without equity, such hearing and determination being in excess of the authority of said court, the question having been theretofore heard and determined by said court, another judge sitting, and said question being res judicata in said court.

16. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to hold and operate the defendant's mines, such hearing and determination being in excess of the authority of said court, the question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

17. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to impede any creditor in the prosecution of his claim, such hearing and determination being in excess of the authority of said court, such question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

18. In ordering the complainant to show cause why said suit should not be dismissed because the complaint is without equity and alleges no valid ground warranting the court to hold and operate the defendant's mines or impede any creditor in the prosecution of his claim, such order being in excess of the authority of said court, such question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

19. In ordering, on the court's own motion, the complainant to show cause why his suit should not be dismissed, said order being in excess of the authority of said court.

20. In ordering, on the court's own motion, the complainant to show cause why his suit should not be dismissed, such order being an abuse of the discretion of said court.

21. In making and entering its order dismissing the complainant's suit, such order being an abuse of the discretion of the said court.

22. In making and entering its order dismissing the complainant's suit, such order being in violation of judicial comity.

ARGUMENT

The assignments of error, though numerous, present but two questions. The discussion which follows will therefore consider the assignments as grouped under the following heads and sub-heads:

1. The lower court lacked authority to make and enter its order of July 13, 1927, discharging the receivers and dismissing the suit. (This question is presented by assignments 1, 14, 15, 16, 17, 18 and 19.)

2. The lower court lacked justification and warrant for the order discharging the receivers and dismissing the suit assuming that said court had the necessary authority, because

(a) The bill of complaint is not wanting in equity. (Assignments 1, 2, 3, 4, 6, 7 and 8).

(b) The answer and consent of the defendant company is sufficient. (Assignment No. 5).

(c) The cause is not sham, is not lacking in bonafides, is genuine litigation, is not collusive, and the amount of plaintiff's claim is not a fact properly to be considered. (Assignments 5, 9, 11 and 12).

1. *The District Court was without authority to make and enter its order of July 13, 1927, discharging the receivers and dismissing the suit.*

As has already been explained, the action of the District Court (Honorable George M. Bourquin sitting) in discharging the receivers and dismissing

the suit was taken upon the court's own motion, after the same court (Honorable John H. McNary sitting) had accepted complainant's bill as sufficient and had appointed the receivers and approved their bond. No appearance was made in the case opposing the appointment of receivers, either at the time of their appointment, or subsequently at the time of the hearing of the order to show cause. The only questions presented by the order to show cause were such as could be raised upon the record; in effect, the order questioned the sufficiency of the complaint.

It is the contention of appellant that this question was res judicata in said court. The same question was of necessity presented to the court on June 10, 1927, when the complaint was presented to and considered by Judge McNary and at that time it was passed upon favorably to the complainant. At the time the matter was before the court on July 13th, there were no new questions before the court. There was no new data in the record upon which new questions could be raised. The only additions to the record between June 10 and July 13 were the preliminary report of the receivers and a petition asking for confirmation of the acts stated in said report, and such preliminary report disclosed in detail the insolvent condition of the defendant company, and in that respect supported the allegations of insolvency contained in complainant's bill. The situation

then was that on June 10th the court found that the complaint was sufficient, and on July 13th the same court, without any change in the situation, but with another judge sitting, found that it was not.

On both occasions the action was the action of the court. The only difference was in the personnel thereof. There is no question of the authority of Judge McNary to act. He was duly authorized to do so, and having acted, having passed upon the complaint and the sufficiency thereof, his act was the law of the case, and should have been so treated by any other judge sitting in the same case in that court.

See *Commercial Union of America, Inc., vs. Anglo-South American Bank,* 10 Fed. (2d) 937.

In the foregoing case the United States Circuit Court of Appeals, for the Second Circuit, passed upon a similar situation. As stated in the opinion, p. 938, "The situation presented therefore is this: that after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it. We are not aware that it has ever before happened that in the Southern District of New York, or in any district within this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit," and it was held "that the decision made by Judge Mack was the law of the case

as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other."

To the same effect is *Appleton vs. Smith,* 1 Fed. Cas. 1075, Fed. Cas. No. 498, wherein Justice Miller, sitting as a circuit judge, said with relation to a similar situation:

> "Where, as in the present case, the motion is made on the same grounds and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such prerogative. . . . It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other."

Also:

U. S. vs. Biebush, 1 Fed. 213.

Cole Silver Min. Co. vs. Va. & Gold Hill Water Co., 6 Fed. Cas. 72, No. 2990.

In the latter case, Justice Field sitting in circuit court, said:

> "I could not with propriety reconsider his (another circuit judge) decision, even if I differed from him in opinion. The circuit judge

possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law, should be disregarded or be open to review by the other judge in the same case."

In *Oglesby vs. Attrill,* 14 Fed. 214, the court said, on being asked to set aside a substituted service of process:

"I find that this question has been passed upon and adjudicated by the District judge sitting in this court in the early stage of this case. This decision is not open for review to any other judge sitting in this court in the same case."

In *Wakelee vs. Davis,* 44 Fed. 532, the court said:

"It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court to be followed upon similar facts until a different rule is laid down by the Supreme Court."

In *Shreve vs. Cheesman,* 69 Fed. 785, 790, Judge Sanborn of the Circuit Court of Appeals said:

"It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. . . . Nor has it been thought less vital to a wise administration of justice in the Federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other,

> especially upon questions involving rules of property or of practice, except for the most cogent reasons."

"One judge will not review the rulings of another in the same court." *Taylor vs. Decatur Co.,* 112 Fed. 449; and in *Plattner Implement Co. vs. International Harvester Co.,* 133 Fed. 376, the court said (Judge Sanborn):

> "But the rule itself (referring to it as a 'rule of comity and necessity'), and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed."

To this effect are:

U. S. vs. Rizzinelli, 182 Fed. 675, 678;

In re Alpern, 280 Fed. 432, 437;

Claflin vs. Furtich, 119 Fed. 429;

U. S. vs. Maresca, 266 Fed. 713.

In the latter case at page 724 the court said:

> "I have no more power to grant this motion than I would to issue an order to show cause why an order sustaining a demurrer to an indictment entered at the same time before another judge should not be vacated and held for naught."

The soundness of the rule stated in the above cases has been already recognized by this court in at least two instances—*Gardner vs. U. S.,* 13 Fed. (2d) 851 and *Presidio Mining Co. vs. Overton,* 261 Fed. 933.

In the latter case a bill for receivers having been declared insufficient by Judge Dooling, and the question being raised in a subsequent case before Judge Van Fleet, the court said:

> "The insufficiency of the original complaint thereupon became res judicata in the subsequent proceedings before Judge Van Fleet."

and cited a number of cases and quoted Justice Field's language in *Cole Silver Mining Co. vs. Virginia Gold Hill Water Co., supra,* as set forth above.

In view of the foregoing it would seem that the rule as above stated is a well established and recognized doctrine, and is directly applicable to the situation presented here.

The rule is based fundamentally upon the principle as stated by Justice Field, supra, that any other rule "would lead to unseemly conflicts or as stated by Justice Miller in the Appleton case, supra, to

"unseemly struggles", or as more fully set forth by Judge Dietrich in the *Rizzinelli* case, *supra,*

> "It is highly important to the orderly administration of justice that in the same jurisdiction there be uniformity of decision. Well considered precedents should be cast aside only for the most cogent reasons. The general rule which forbids judges sitting in the same court from ignoring for light reasons, the decisions of each other, does not have its origin merely in motives of personal courtesy, but as experience amply proves, rests upon consideration of a wise public policy. Any other course would tend to unseemly struggle in the courts, and would ultimately result in a weakening of public confidence in the soundness and finality of judicial decisions."

In this connection we would also call attention to the fact that the order from which this appeal is taken overrules the action of Judge McNary, a jurist of co-ordinate jurisdiction sitting in the same court, and, in addition, is contrary to the finding of Judge Cant, the United States District Judge for the District of Minnesota, who took action similar to that taken by Judge McNary upon a similar complaint and proceeding.

We are aware that the ruling and action of the United States District Court, for the District of Minnesota, Fifth Division, is not necessarily binding upon the United States District Court, for the District of Montana, and that the rule of comity between the Federal courts created no express obliga-

tion upon the Montana court in this regard, but nevertheless the action taken by a court of primary jurisdiction in receivership proceedings should have weight with and be given due consideration by a court of ancillary jurisdiction, in which the proceedings instituted are in aid of the jurisdiction of the primary court. But for the fact that in the instant case the primary and ancillary courts are located in different circuits, the ancillary proceedings in aid of the jurisdiction of the primary court would have proceeded largely as a matter of form, subject, of course, to the disapproval by the Circuit Court of Appeals as provided by Section 117,Title 28, U. S. Code. We contend that an order of a District Court which in effect reviews and overrules a decision of another United States District Court even though of another Circuit, and in addition reviews and overrules its own decision, presents a situation which, in an exaggerated form, tends to "ultimately result in a weakening of public confidence in the soundness and finality of judicial decisions" and that the action taken by the Minnesota court should not have been without weight with the Montana court.

In *Sands vs. E. S. Greeley & Co.,* 88 Fed. 130, in considering primary and ancillary receivership proceedings in different states, the court used the following language:

> "When such an application (ancillary) is made, the court to which it is addressed exercises its own original jurisdiction. The decree

> in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union."

And in *Walker vs. United States Light & Heating Co.,* 220 Fed. 393, Judge Hand (citing *Sands vs. Greeley, supra*) said:

> ". . . The adjudication in the other (primary) suit that receivers should be appointed, made with the consent and at the request of the defendant corporation, amounts, I think, to a decree had upon the complaint instituted by a creditor, who had no judgment, for the benefit of all other creditors, to the effect that the case was a proper one for a determination of all claims by a court of equity and that a receiver was necessary. . . . Accordingly, I think the necessity and propriety of the relief herein asked for has already been adjudicated in the Western district of New York. . . . "

The principle thus announced would, we apprehend, have equal applicability to decisions between Federal courts of different jurisdictions, and that, in consequence, the decision and action of the United States District Court of Minnesota was and is evidence that the corporation is insolvent, and that a proper case for receivership exists in the Minnesota District. It should be borne in mind, too, that an ancillary proceeding is in aid of a primary suit, and

that comity dictates that such aid should be extended wherever proper.

The appellant believes that beyond question the foregoing rule disposes of this appeal, but, if it is held that a judge of the lower court had authority to overrule another judge of the same court, then, appellant contends that

2. *The District Court lacked justification and warrant for dismissing the suit and discharging the receivers.*

A consideration of this question requires an examination of the order to show cause upon which the final order dismissing was based, and the reasons assigned by the court for its final action.

The order to show cause read as follows:

> "Herein, it appearing to the court that the bill of complaint is without equity, that no valid ground is alleged which warrants the court to engage in operating mining property of defendant as it now is, or to impede any creditor in collection of any his claim, it is ordered that on July 13, 1927, at 9:30 A. M., the parties show cause, if any they have,
>
> (1) Why the order heretofore made appointing a receiver be not vacated for that it was mistakenly and improvidently made, or/and
>
> (2) Why the receivership should not end and the suit be dismissed forthwith.
>
> July 9th, 1927.
>
> BOURQUIN, J."
>
> "Filed July 9, 1927.
> C. R. Garlow, Clerk."

Obviously this was a double order. The court had in contemplation two possible actions:

First—the vacation of the order of Judge McNary made June 10th;

Second—the dismissal of the suit and the end of the receivership.

These two possibilities differed widely in their effect. If the order finally made vacated the order of June 10th, it would have been a finding that the receivership never properly existed, and the acts of the receivers would have been without warrant at law. If the order finally made terminated the receivership, it was a recognition of the existence and of the authority of the receivers to act while they did act. The court upon consideration of the order to show cause did not vacate the order of June 10th, but made an order dismissing the suit and discharging the receivers.

The reasons assigned, and the questions raised by the order to show cause are likewise clearly divisible.

1*st*. As to an order vacating the court stated that it appeared

a. That the bill of complaint is without equity;

b. That no valid ground is alleged, which warrants the court to engage in mining operations;

c. That no valid ground is alleged which warrants the court to impede any creditor in the collection of his claim;

d. That the order of June 10th was improvidently and mistakenly made.

2*nd*. As to an order dismissing the suit and ending the receivership, the reasons assigned were the three reasons enumerated above as a, b, and c.

There is no allegation or appearance of improvidence or mistake as to an order dismissing and so far as showing cause why such an order should not be made, no one was required to show such mistake or improvidence.

In substance then, and as far as an order dismissing was concerned, the complainant was, in effect, called upon only to show that the allegations of the complaint were sufficient to sustain a receivership action.

It is, and was at the hearing, the contention of appellant that the allegations were sufficient.

The reasons for the final order of the court as enumerated in its decision accompanying the order were in substance:

a. That the bill of complaint is wanting in equity; (Assignments of Error 1, 2, 3, 4, 6, 7 and 8).

b. That the consent of defendant is insufficient; (Assignment of Error 5).

c. That the cause is sham, not bona fide and genuine litigation, lacking in good faith,

collusive and for a small amount (Assignments of Error 5, 9, 11, and 12).

The appellant contends that:

a. The bill of complaint is not wanting in equity.

In order to confer jurisdiction upon the court in such a suit as this, the complainant must set forth certain facts.

(1) Diversity of citizenship and corporate existence.

Complainant was a resident of Illinois. Defend- was a Minnesota corporation with property in Montana.

(2) A jurisdictional amount.

The statute requires that the amount in controversy shall exceed $3,000.00. The claim of complainant was $6,500.00, and although this amount and the fact that the action is brought for the benefit of all creditors gives rise to sarcastic comments in the decision of the court, the fact remains that the action is so brought and redounds for the benefit of such creditors. The amount of complainant's claim is substantially in excess of the jurisdictional amount required.

(3) Description of the property.

The properties of the defendant company so far as known to plaintiff were adequately described so that they could be identified.

(4) Showing as to inadequacy of legal remedies and the applicant's right or interest.

The appellant in this case is a general creditor; the procedure is what is commonly called a consent proceeding wherein the defendant appears by its attorney and files its answer admitting the allegations of the complaint.

The rule in such cases is stated in Foster's Federal Practice, Sec. 302-a, p. 1486, to be that a court will appoint receivers of a corporation

> "At a suit of unsecured creditors where the corporation makes no defense and waives the right to require complainants to reduce their claims to judgment, upon proof that the corporation is insolvent, that unless the court interferes its business will be interrupted by levy of judgments and executions. . . ."

Now that which was formerly considered the essential thing, the judgment, is unnecessary, unless the corporation objects.

The foregoing rule is well settled in the Federal courts by the following cases:

In re Reisenberg, 208 U. S. 90;

Hollins vs. Brierfield, 150 U. S. 371-380;

Central Trust Co. vs. McGeorge, 151 U. S. 129;

Brown vs. Lake Superior Iron Co., 134 U. S. 530;

Reynes vs. Dumont, 150 U. S. 354;

Am. Can Co. vs. Erie Preserving Co., 171 Fed. 540, 183 Fed. 96;

Guarantee Trust Co. vs. Int. Steam Pump, 231 Fed. 594;

These cases hold that if the suit is commenced by a simple contract creditor the objection, if any, as to complainant having an adequate remedy at law must be taken *in limine,* and if not so taken is waived.

The language of *Brown vs. Lake Superior Iron Co., supra,* is as follows:

> "But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant if it had so chosen to act in the first instance could have defended its possession and defeated the action, still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance and the same day a receiver was appointed without objection on its part."

And in *Hollins vs. Brierfield, supra,* it was said that while a simple contract creditor of an insolvent corporation

> "cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claims," nevertheless "defenses existing in equity suits may be waived . . . and when waived the cases stand as though the objection never existed. . . . "

> "If there was a defense existing to the bills as framed, an objection to the rights of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made *in limine* and does not of itself oust the court of jurisdiction."

And as to the objection that the plaintiff was a simple contract creditor the rule was stated in *In re Reisenberg, supra,*

> "It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by defendant consenting to the appointment of the receivers and admitting all the facts averred in the bill. . . . That the complainant has not exhausted its remedy at law—for example, not having obtained any judgment, or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated in the opinion, in the above case (*Hollins vs. Brierfield*) and when waived the case stands as though the objection never existed. In the case in the Circuit Court the consent of the defendant to the appointment of the receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied in whole or in part, amounted to a waiver of that defense."

In the case at bar, the defendant appeared both in Minnesota and in Montana by its attorney, and filed its answer admitting the allegations of the bill,

and it has never at any time since appeared and objected. The objection therefore as to the fact that the complainant was a simple creditor who had adequate remedy at law was waived at the commencement of the proceedings, and remains now in that status.

In considering the rule that in equity there must be a showing that there is no adequate remedy at law, we would call attention to the fact that in determining the question, the adequacy of the legal remedy must be considered. The rule in that regard is well recognized, as stated in *Williams Federal Practice* (2d Ed), that "Generally speaking, in order to exclude a concurrent remedy in equity, the remedy at law must be as complete, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce vs. Grundy,* 3 Peters 210, 215; *Trade Dollar Consolidated Mining Co. vs. Fraser,* 148 Fed. 585, 593.

And a bill is not insufficient because it does not show the plaintiffs have exhausted their legal remedies it appearing that such remedies are inadequate or would be ineffectual or that the appointment of a receiver is necessary to preserve the property or fund, or to secure justice to the parties.

Heavilon vs. Frankfort Bank, 81 Ind. 249;

Chicago Ry Co. vs. Kenney, 159 Ind. 72;

Columbia Sand Dredge Co. vs. Washed Bar, 136 Fed. 710;

In the present case the allegations of the bill demonstrate, when considered and analyzed, that to relegate the complainant here to his remedy at law, would have obliged him to resort to a remedy which would have been wholly futile and inadequate. This is apparent from a consideration of those allegations which set forth the condition of the company's affairs. For the sake of brevity and to avoid repetition the conditions referred to will be considered under the next heading.

(5) Necessity of appointment.

The allegations of the complaint setting up the condition of the company affairs and whereby the necessity for the appointment is demonstrated, as well as the inadequacy of complainant's legal remedy are, we believe, quite full, and more than sufficient to establish such a necessity. It must be borne in mind that all such allegations stand uncontradicted on the record, and that the decree of the Minnesota court is evidence that the corporation is insolvent and that a proper case exists in that State for the appointment of receivers.

To enumerate such allegations:

1st. It is alleged that there was a large amount of indebtedness, to-wit:

Bonded indebtedness, $506,200.00, of which $115,000.00 was past due;
General Creditors, $76,000.00, all past due;
Notes, $75,000.00, part past due and balance shortly to mature;

and in addition there was interest on bonds very shortly to mature.

In this connection appellant would call attention to the fact that the preliminary report of the receivers which sets out in detail the actual condition of the accounts was before the court at the time of the making of its order dismissing and is a part of the record herein. That report shows:

Bonded Indebtedness $507,250.00, as alleged in complaint;

General Creditors over $79,000.00, as alleged in complaint;

Notes $76,000.00, of which $61,000.00 was past due;

Interest falling due in July, 1927, approximately $14,000.00.

2nd. It is alleged that the assets of the company were:

Mining properties estimated at	$8,500,000.00
Personal property at Butte	50,000.00
Personal property at Duluth	100,000.00

Of the foregoing the mining properties are not available to meet the current obligations of the company. Reference is made to the receivers' report which shows that the personal property at Duluth alleged as worth $100,000.00 consisted of capital stock in certain mining corporations holding the title to certain mining claims. Such stock was not marketable and of no practical value to the company in meeting its current obligations. The receiv-

ers' report (Exhibit C) further shows that the company at the time of the receivership had

Cash on Deposit	$613.99	
Subject to outstanding checks	178.75	$ 434.44
Accounts Receivable		26,082.59
		26,517.03

and of the Accounts Receivable so listed $24,273.79 was due from one of the company's largest creditors to which it at the time owed a total of over $42,000; in short, that the net available quick assets were $2,243.24 ($26,517.03—$24,273.79) with which to meet

Past due bonds	$115,000.00
Past due and shortly maturing notes	76,000.00
Balance of Accounts Payable of over	55,000.00
Shortly maturing bond interest of over	13,000.00
	$259,000.00

and in addition, that the company had outstandstanding bonds aggregating over $391,000.00 which might shortly be in default for non-payment of interest.

3rd. It is alleged that various creditors are pressing their claims and that actions at law may be instituted, judgments and executions be obtained and inequitable preferences result. Further, that irreparable injury will be done complainant and other creditors, beside stockholders, that the good will of

defendant will be lost, its ability to eventually proceed destroyed and the value of its properties irreparably impaired. It is further alleged that there are a large number of creditors.

4th. It is alleged that defendant is without funds to meet its obligations past due and shortly to mature, and is unable to borrow the money necessary; that it has failed in its efforts to sell its bonds.

It is the contention of the appellant that the foregoing allegations and facts are more than sufficient to bring the complainant within the rule justifying a receivership, and that to ignore the same and dismiss the suit is error.

In *Cincinnati Equipment Co. vs. Degnan,* 184 Fed. 834 (C. C. A. 4th Cir.) and cases cited, it is held the inability of a corporation to pay its current obligations as they mature in the ordinary course of its business constitutes insolvency in a general sense, which will authorize the appointment of a receiver by a court of equity in a creditors' suit, and that a bill against a corporation sufficiently alleges insolvency when it alleges facts from which such condition may be naturally and reasonably deduced.

In *Durand vs. Howard & Co.,* 216 Fed. 585, which was a suit where the defendant company had assets largely exceeding its liabilities but did not have money to meet its obligations as they fell due and could not borrow, the court said:

> "The power of a court of equity to appoint a receiver has long been recognized as one of as great utility as any which belongs to the court. It is exercised to prevent fraud, or to save the subject of litigation from material injury or to rescue it from inevitable destruction. A receiver is appointed when it appears necessary to do so to preserve the property and give adequate protection to the rights of the parties interested in it. . . . The intention was to prevent injury to creditors by a slaughter of the assets through forced sales, and also to prevent a preference among creditors. . . . They (the receivers) have been put into the possession of this property because the interests of justice can in this way be best secured."

It would seem that the duty of the court in each case must, to a degree, depend upon the showing therein. In the instant case, appellant contends that a great necessity was shown. Here was a company with frozen assets in the form of mining properties, matured debts of over $246,000.00 interest to the amount of over $13,000.00, falling due in a few days, and to meet this load it had of available Accounts Receivable and in cash slightly over $2,200.00. Under such circumstances, it would appear that the actions of Judges Cant and McNary were dictated by a wise discretion, and a just regard for the welfare of the stockholders of defendant company, as well as its creditors and bondholders. That certainly the allegations were entirely sufficient to justify them in their action, and that such action should not be

subject to reversal on the same record at the instance of another judge of co-ordinate jurisdiction.

B. The answer and consent of the defendant company is sufficient (Assignment of Error 5).

As has been stated this action was and continues to be what is commonly called a friendly receivership or consent proceeding. In the decision of the lower court the fact that the consent of the company to the appointment of the receivers was signed by the secretary is referred to "as sham and void upon its face in that a corporate secretary has no authority to thus displace the officers and management chosen by stockholders and to thus pave the way for corporate death."

This is a finding that the secretary did not have authority and that he displaced the officers and management, and yet there is nothing whatever in the record to support such a finding. The defendant company nor its creditors, nor any interested party has made any such assertion, nor have any affidavits or proof thereof been submitted.

Neither has the complainant been called upon or required to make proof thereof. The order to show cause herein did not mention the answer or consent, and did not give any notice to the complainant that they were called in question.

On the record, therefore, appellant contends that there is no justification for a finding of "sham"

with relation to the consent or any other pleading or for a finding of lack of authority.

The only question proper to raise with reference thereto would be as to the effect of an answer or consent of a defendant company signed by its secretary and signed and presented by its solicitor where such pleading is not repudiated or attacked by the litigant or an interested party.

In the primary suit the defendant appeared by its solicitor and filed its answer and consent. In the ancillary suit it also appeared by another solicitor and filed its answer. The lower court now takes the position that none of these pleadings are valid. If they are valid there is no question that all objections on the ground of adequate remedy at law and simple contract creditor are waived.

See the cases above cited.

As to the worth of these pleadings and the validity thereof:

We call attention to the fact that the lower court in its decision tacitly admits that they are sufficient, for immediately before declaring them "sham and void" it is stated "In so far as defendant's consent is relied upon and *might serve,* be the court amiable and ambitious to embark upon a mining venture, etc." This can be construed only as an admission that if a court saw fit it might accept such pleadings as a basis for such a suit. But we respectfully sub-

mit that if the pleading was not sufficient, a court could not accept it, whether the court was "amiable" or otherwise.

Further, it is to be noted that in the decision of the court immediately following its statement with reference to the secretary, the court says:

> "Passing that, however, the complaint is altogether wanting in substance, etc."

indicating again that the lower court recognized the fact that the objection thus stated was of no weight.

It is the contention of appellant that any question as to the authority of the secretary is entirely beside the point. That as far as forming a basis for dismissal of the action whether the secretary was authorized or not, or whether the defendant signed a consent or not is entirely immaterial.

For it is the position of appellant that the pleadings by defendant herein are sufficient and of binding force and effect.

That a pleading of a party signed by its solicitor is a valid pleading and the act of the party.

As to the effect of the appearance of a party by its solicitor and the pleadings signed by him, Equity Rule No. 24 provides that

> "Every bill or other pleading shall be signed individually by one or more solicitors of record and such signature shall be considered as a certificate by each solicitor that he has read the pleadings so signed by him; that upon the in-

> structions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleadings and that it is not interposed for delay."

In this case we do not, in any event consider the "consent" as at all vital. It is the answer which is the important pleading, for it is by the answer, and not by the consent to the appointment of certain receivers, that the defendant waives what objection it may have to the bill.

If in any case the defendant saw fit to sign its answer by an officer, even though no affirmative showing was made as to that officer's authority, if the answer was also signed by its solicitor, it is sufficient.

To hold that a party represented in court by its solicitor, who files his pleading signed by such solicitor, has performed an act which is "void" and a nullity, is to abrogate entirely the effect of the Equity Rule cited.

C. *The cause is not sham, is not lacking in bona fides, is genuine litigation, is not collusive, and the amount of complainant's claim is not a fact properly to be considered.* (Assignments 5, 9, 11 and 12.)

Again for the purposes of condensation the foregoing assignments are grouped. They are properly so grouped, we believe, for they all arise from similar statements appearing in the decision of the lower court. They amount to findings to that effect. The

answer to all such findings is the same. That is, there are no allegations in the pleadings and absolutely no facts in the record upon which the lower court could find

a. That the defendant's consent is sham.
b. That the complaint is unreliable.
c. That in no just sense is there insolvency.
d. That the allegations of the bill relative to threatened suits were made in excuse of complainant's precipitancy.
e. That there was a race to be first for the emoluments of a receivership.
f. That this is not genuine and bona fide litigation.
g. That the suit lacks good faith.
h. That the suit is obviously collusive between an amiable creditor and quasi "dummy" plaintiff and a faction of the corporation.
i. That the suit is designated to "gain some inequitable advantage and to accomplish some ulterior purpose.
j. That Kennedy or the defendant virtually dictated whom the courts should appoint for their own hand, etc.
k. That coercion was used toward the courts.
l. That there is no equity by reason of the small amount of plaintiff's claim.

Appellant claims that such statements as the foregoing, when no foundation therefor appears in the record, are totally uncalled for and unwarranted. What showing is there, and upon what can the court base a finding that this complaint is not filed in good faith, that it is not bona fide litigation,

that it is not genuine litigation, that the allegations of the bill were made in excuse of plaintiff's precipitancy to be first in a race for the emoluments of a receivership? What showing is there that there was any "race"? What showing is there that plaintiff is a "dummy" and that the suit is between plaintiff and a faction of the corporation to gain an inequitable advantage and for some ulterior purpose?

There is absolutely nothing in the record to support such assertions and, if there were, if such contentions were made, we submit that plaintiff would be entitled to his day in court, to refute them. It is wholly impossible, however, for any litigant to dispute facts which are not shown, and thoughts and ideas which are not at issue.

What evidence is there that the courts have been "coerced" or been "virtually dictated" to? Such a statement is so obviously unfounded that it needs but the repetition to emphasize its absurdity. With reference to it we merely wish to have it understood that the reflection upon the Federal courts contained therein does not emanate from counsel.

With reference to the remark concerning the amount of plaintiff's claim, we would repeat what has been before stated herein. To hold that the right to relief is at all governed by the size of a claim, so long as it meets with the jurisdictional requirements

is a new and startling doctrine, and we are inclined to the belief that if it is to be held that a party with a large claim is entitled to relief and a party with a small claim is not, it would be very persuasive in inciting "the storms of judicial recall which persistently lower along the political horizon," although we must confess to an inability to perceive what bearing such storms have upon this or any other cause of action.

As to the finding that this cause is "obviously collusive." It is probable that this arises from the fact that the case is what is commonly known as a friendly receivership. However, the fact that when action in receivership is brought, the defendant acquiesces and joins therein does not establish collusion. Friendly receiverships are a very common form of proceeding and highly conducive to proper protection of all parties concerned, stockholders as well as creditors. Such receiverships have been repeatedly recognized, and the fact of their non-collusive character is well established.

In *Atwater vs. Community Fuel Corporation,* 291 Fed. 686, 688, the court said:

> "With respect to the charge of collusion, I do not understand that in an action in equity brought against a corporation for the purpose of conserving its assets, the consent and approval of the defendant is such collusion as is forbidden by the courts. The theory of such an action in equity is that the defendant will co-

> operate in an honest attempt to conserve the assets for proper distribution among the creditors."

In re Reisenberg, 208 U. S. 90, 52 L. Ed., 403, 412, it was asserted that there was collusion between the complainants and the street railway companies, but the court found no evidence of collusion. Here, as in the Reisenberg case, it does appear that the parties to the suit desired that the administration of the company's affairs should be taken in hand by the United States District Courts of Minnesota and Montana, and to that end, when the suit was brought, the defendant admitted the averments of the bill, and united in the request for the appointment of receivers. But there is nothing in the record to show that the averments in the bill were untrue, or that the debt named in the bill as owing to complainant did not exist; nor is there any question as to the citizenship of complainant and defendant, and there is nothing in the record to indicate that any fraud was practiced for the purpose of thereby creating a case to give jurisdiction to the Federal courts. As was said in the *Reisenberg* case,

> "That the parties preferred to take the subject-matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the state is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

See also

Burton vs. Peters, etc., Co., 190 Fed. 262, 265;

Guaranty Trust Co. vs. Int. Steam Pump Co., 231 Fed. 594, 603-4.

Upon all the foregoing, appellant respectfully submits that the lower court erred in entering its order from which this appeal is taken.

Respectfully submitted,

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Attorneys for Appellant.

No. 5272

In the

United States Circuit Court of Appeals

For the Ninth Circuit

3

FRANCIS H. HARDY
Appellant

vs.

NORTH BUTTE MINING COMPANY,
a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Montana

Appellant's Reply Brief

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Appellant's Reply Brief

Pursuant to leave given at the close of the hearing of this appeal, a brief has been filed by Messrs. Charles R. Leonard and J. A. Poore as *amici curiae*. The points made have been fully discussed in appellant's opening brief and no extended reply seems necessary.

We pass with brief comment only the comments of counsel appearing at page 49 of their brief. The intimation that the receivership is designed to wreck the defendant corporation and to wipe out

the property rights of the stockholders, we assume will not be permitted to influence the decision of the court. Nothing in the record gives any warrant for accusations of this kind and, as the bill indicates, the purpose of the receivership is just the contrary. Without the intervention of receivers there is imminent danger of attacks by many creditors the result of which will be the sacrifice of the assets of the company, to the great loss of the company and its stockholders.

We answer the argument of counsel as follows:

1. Complainant, though a simple contract creditor, took the position of a judgment creditor by reason of the answer and consent filed by defendant. The answer of defendant did not operate to confer jurisdiction, but instead to waive a defense available to the defendant company.

2. Upon the record the authority of the secretary of the company to consent for the defendant company, and the authority of defendant's solicitor to file an answer admitting the allegations of the bill, are not open to question. In the absence of any showing to the contrary there is a conclusive presumption of authority on the part of the solicitor who on behalf of the company signed and filed its answer.

3. The action taken by Judge Bourquin was not the vacation, within the same term, of an order improvidently or inadvertently made. Without any

showing of improvidence or inadvertence and at a later term the court discharged the receivers and dismissed the case. This was a reversal of a decision of a coordinate judge in the same court at a later term with no change in the record. Without an affirmative showing and a change in the situation evidenced by moving papers by way of intervention or otherwise, the court was without power to take this step.

I.

The brief of *amici curiae* apparently does not challenge the sufficiency of the bill except in that it shows complainant to have been a simple contract creditor only; and it is perhaps not open to argument that if complainant had been a judgment creditor the bill would be considered sufficient to invoke the discretionary power of the court to appoint receivers. Although the defendant corporation had assets valued at a sum greater than the amount of its liabilities, there were no liquid assets available for the payment of overdue obligations, and if complainant levied execution or attached, and other creditors in large numbers took like action (and the bill alleges imminent danger of this), the result would be a conflict of liens and an ultimate sacrifice of the assets of the defendant corporation, to the detriment of complainant and other creditors, and to the loss of the defendant

and its stockholders. In such a situation the courts have not hesitated to lend their aid through the medium of a receivership. Many instances of this appear in the books and citation of authority seems unnecessary. The principle apparently is conceded by counsel.

Counsel confuse the question of jurisdiction of the court with the question of its discretionary power, and mistakenly assume that the consent of the defendant corporation was relied upon to confer jurisdiction not otherwise existing. The bill stated the facts showing jurisdiction of the parties and of the subject matter, but without the waiver of the defendant corporation the court would not have exercised the power of appointing receivers. *In re Reisenberg,* 208 U. S. 90, and other cases (cited in appellant's opening brief) make clear that defendant has a right to object to the appointment of receivers upon the petition of a simple contract creditor. But this is a defense which may be waived, and as the court says in the Reisenberg case, "when waived the case stands as though the objection never existed." In effect the waiver of this objection places the complainant in the position of a judgment creditor; and the discretionary power of the court to direct receivership is no longer open to question.

The bill therefore was adequate to establish jurisdiction. The consent of the defendant to the

appointment of receivers did not operate to confer jurisdiction but rather to remove an objection to the exercise of the court's discretionary power which otherwise could have been made by defendant.

II.

The court will note, on the question of the validity of defendant's waiver and consent, that no one claiming any interest in the matter has undertaken by intervention or otherwise to challenge the authority of the secretary of the company to execute the consent to the appointment of receivers. The consent was executed on the 8th day of June, 1927 (Transcript of Record, pp. 23, 24), and if the act of the secretary in executing and filing this document was beyond his authority, certainly there has been ample opportunity since for the corporation or anyone interested to appear and make that fact known. This court cannot assume that the corporation had not taken such steps as may have been required by its articles of incorporation and by-laws, to vest the secretary with power to do what was done here. The corporation may speak through any officer it may select and unless a showing is made that no such authority was in fact given the officer who has acted, the question is foreclosed.

It should be said also that after the appeal to this court was perfected there were filed, in support of a motion to expedite the hearing, affidavits showing that the secretary had been given express authority by the corporation to sign the answer and consent.

The argument of the brief of *amici curiae* on this point overlooks the fact that in addition to the filing of the consent the validity of which is challenged, the defendant corporation appeared through its solicitor and filed an answer admitting the allegations of the bill; and it is the waiver resulting from this answer, as much as the consent itself, which permits the exercise of the discretionary power to appoint receivers in a case brought by a simple contract creditor. The cases cited in appellant's opening brief make this clear. When the corporation appears and answers and does not make the point that complainant is a simple contract creditor and may have a remedy (though perhaps not wholly adequate) at law, there is no one then in a position to say that the application for receivership cannot be considered because complainant's claim has not been reduced to judgment.

Therefore, without any consent to the appointment of receivers, an appearance and an answer on the part of the defendant waiving the point that complainant is not a judgment creditor and has no lien, removes any doubt of the power of the court

to proceed. The record here shows that such an answer was duly filed, signed not only by the secretary of the company but by its solicitor, both in the original proceeding in the District Court for the District of Minnesota, Fifth Division (Transcript of Record, p. 22) and in the present case (Transcript of Record, p. 56).

In the absence of any showing to the contrary, there is a conclusive presumption that a solicitor thus signing and filing an answer on behalf of a litigant was duly authorized to act.

Kynerd v. McCarthy, et al., 3 Fed. (2d) 32.

Drew v. Burley, et al., 287 Fed. 916.

In re Gasser, 104 Fed. 537.

Underfeed Stoker Co. of America v. American Ship Windlass Co., et al., 165 Fed. 65.

Osborn v. U. S. Bank, 9 Wheat. 738, 830.

Hill v. Mendenhall, 21 Wallace 453.

Ritchie v. McMullen, 159 U. S. 235.

In re Miller's Estate (*Welcher v. Houston*), 223 Pac. 851.

Rutledge v. Waldo, et al., 94 Fed. 265.

Schieber v. Hamre, 10 Fed. (2d) 119.

These cases establish that when an attorney appears and signs an answer or consent the presumption of law is that he has authority from defendant so to act. In the absence of any showing to the contrary in the record, this presumption is conclu-

sive and the burden is on the opposing party to show that the solicitor did not have the authority he attempted to exercise. There is nothing in the record here even to suggest that the act of the solicitor for defendant corporation in signing and filing an answer was not authorized. Without proof of lack of authority the question here is not open to discussion.

III.

Complainant accepts without question the rule of the cases and texts cited in the brief of *amici curiae* on the question of the authority of the court to annul or reverse the order appointing receivers. It is of course true that there is power to terminate a receivership *"upon a showing* affecting the propriety of the original action of the court." And it is also true that if the original order was for any reason absolutely void, it may be abrogated by the court of its own motion.

But the record here includes no showing of any kind in any manner affecting the propriety of the original order appointing the receivers. The order to show cause (Transcript of Record, p. 177) suggests that the original order may have been mistakenly and improvidently made, but no showing was made by anyone of any improvidence or inadvertence. Indeed, the final action taken by the court in discharging the receivers and dismissing

the case, does not treat the original order as void but recognizes it and undertakes to reverse it. Upon the principle of the cases cited in appellant's opening brief, Judge Bourquin was without power to substitute his judgment for that of Judge McNary, upon the same record and without any change in the situation of the case.

The case is not one in which the court has undertaken, during the term at which an order was entered of record, to set aside or vacate such order. As the record shows, Judge McNary was designated to hold a term of court in the District of Montana during the month of June, 1927. The action of Judge Bourquin was not taken in response to any application made during this June special term, and after the expiration of the term the court was without power, on the same record, to set aside and vacate the order.

The case is one of the exercise of a discretionary power, by Judge McNary, upon appropriate pleadings, and any contention that there was improvidence or inadvertence in the court's action of necessity contemplates a showing to that effect. "Improvidence" or "inadvertence", as the term is employed in the cases, means negligence or carelessness, and we think it clear that upon a debatable point of law (if indeed the point is debatable) a difference of opinion between two coordinate

judges of the same court does not show improvidence or inadvertence.

It is of course obvious that if the facts had been incorrectly presented to Judge McNary, a showing to that effect would justify the conclusion that the original order had been made improvidently or inadvertently. No such showing has been attempted here and the rule invoked by counsel has no application.

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P. E. GEAGAN,
Attorneys for Appellant.

No. 5272.

United States Circuit Court of Appeals For the Ninth Circuit.

FRANCIS H. HARDY,

Complainant and Appellant,

vs.

NORTH BUTTE MINING COMPANY,
A Corporation,

Defendant and Respondent.

BRIEF OF AMICI CURIAE.

CHARLES R. LEONARD,
J. A. POORE.
Amici Curiae.

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Defendant and Respondent.

BRIEF OF AMICI CURIAE.

Upon the application of Charles R. Leonard and J. A. Poore, representing the Stockholders' Protective Committee of North Butte Mining Company, leave has been granted them to file a brief as Amici Curiae in the above entitled cause.

We are not in possession of, nor have we had an opportunity to read, the brief of counsel for appellant, and we are not in possession of a copy of the printed record, but we have secured true copies from the Clerk of the United States District Court of Montana of the documents comprising the record, and are using those in the preparation of this brief.

The record in this case shows that a Bill of Complaint was filed by appellant in the United States District Court of Minnesota, Fifth Division; that at the same time an answer, signed and verified by Frederic R. Kennedy, secretary, was filed by North Butte Mining Company, admitting "each and every of the allegations contained in said Bill of Complaint." At the same time, a consent of North Butte Mining Company, signed by Frederic R. Kennedy, its secretary, to the appointment of John W. Neukom of Duluth, and Matt L. Essig of Butte, as receivers, was filed. Upon these documents an order was entered by said Court appointing Mr. Neukom and Mr. Essig receivers, with all the powers usually given to receivers in such a proceeding.

Thereafter, an Ancillary Bill of Complaint, containing the same allegations as the Bill of Complaint in Minnesota, and Answer in the same form as filed in the Minnesota Court, with certified copy of the consent of the defendant to the appointment of the receivers filed in the Minnesota court, were filed in the United States District Court for Montana, and presented to the Honorable John H. McNary, Judge of the District of Oregon, who had been called in to hear said matter. Upon these documents, Judge McNary entered an order appointing the same parties as were named by the Minnesota court receivers of all of the property, assets, and effects of the defendant, real, personal and mixed, situate and being in the State of Montana, and to take and exercise complete and exclusive control thereof; to continue, in their discretion,

the working of the defendant's mines; to issue certificates of indebtedness to constitute a first lien on the company's property; enjoining all officers and agents of the company, including creditors and stockholders, from in any way interfering with the possession of said receivers, and giving the receivers the usual additional powers in such cases.

Thereafter, the Honorable George M. Bourquin, Judge of said Court, issued of his own motion an order to show cause why the order appointing such receivers in the Montana jurisdiction should not be vacated and the receivers dismissed, and upon such hearing Judge Bourquin vacated said order and dismissed said receivers.

From this last named order dismissing the Bill and discharging the receivers an appeal has been taken to this Court.

Whatever rights the appellant may have must be based upon the allegations of his bill of complaint filed in the District Court of Montana, which bill, omitting the title of court and cause, is as follows:

(Title of Court and Cause)

ANCILLARY BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States, in and for the District of Montana:

FRANCIS H. HARDY, a citizen of the State of Illinois, and a resident of Winnetka, County of Cook, State of Illinois, on his own behalf and on behalf of

all creditors of North Butte Mining Company, and in behalf of all other parties in interest as shall be entitled to and shall elect or be authorized to join in this action, brings this, his Ancillary Bill of Complaint, against North Butte Mining Company, a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, a citizen and a resident of the state of Minnesota, with its principal place of business in the city of Duluth, St. Louis county, Minnesota.

And for his cause of action, the complainant alleges and states as follows:

1. That the complainant, Francis H. Hardy, is now, and for some time past has been, a citizen and a resident of the state of Illinois.

Upon information and belief, that the defendant, North Butte Mining Company, is now, and at all the times hereinafter mentioned, has been, a corporation duly organized and existing under and by virtue of the laws of Minnesota, and is now, and ever since its incorporation has been, a citizen of the state of Minnesota, with its principal place of business in the city of Duluth, St. Louis County, Minnesota.

Upon information and belief, that ever since its said incorporation the defendant has been, and now is, duly admitted and licensed to own, hold, use and enjoy property and to transact business in the State of Montana.

2. That this suit is wholly between citizens of different states, as aforesaid, and that the matter and amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000), exclusive of interest and costs.

3. On information and belief, that the defendant was organized, among other things, to carry on the business of mining, smelting, reducing, refining or working of ores and other minerals and the manufacture of iron, steel, copper and other metals, and to conduct any and all business incidental or appurtenant to the foregoing, and with such other and further rights, powers and authority as are permitted by the laws of the State of Minnesota and provided in the certificate of incorporation of the defendant, duly filed and recorded in accordance with the laws of the said State of Minnesota, reference to which said certificate of incorporation and the recording thereof is hereby made for greater certainty.

4. On information and belief, that the defendant is now, and at all times hereinafter mentioned, was, engaged in the aforesaid business in the States of Minnesota and Montana and elsewhere.

5. Upon information and belief, that the defendant is now and for more than one year last past has been, the owner in fee of certain valuable copper and zinc mines and mineral lands with certain equipment and personal property situated thereon, consisting of about 1,361 acres situate in Silver Bow County, Montana, which mines and mineral lands are commonly known as the North Butte and Tuolumne mines and the East Side and the Main Range properties; that a part of said mines and properties, to wit: the Tuolumne mine and the Main Range property, were acquired in 1926 by purchase from the Tuolumne Copper Company, a Montana corporation, and the balance of the mines and prop-

erties have been owned by the defendant for many years prior thereto.

Upon information and belief, that with one or more periods of cessation, the defendant has for many years developed and worked the said North Butte mine; that it has sunk shafts thereon, one known as Granite Mountain to a depth of 3,740 feet, one known as Speculator shaft to a depth of 2,800 feet and one known as Gem shaft to a depth of 2,200 feet. That on the said East Side properties which have been owned by defendant for many years last past, it has sunk a shaft known as Sarsfield shaft to a depth of 900 feet; that prior to the purchase by defendant of the other properties from Tuolumne Copper Company, as above set forth, the former owners thereof had sunk shafts thereon, one known as the Tuolumne shaft to a depth of 2,800 feet, one known as the Main Range shaft to a depth of 2,200 feet and one known as Colusa Leonard Extension shaft to a depth of 1,200 feet; that this defendant and its predecessors in interest have cut stations in said shafts, done drifting therefrom on said mining claims, made cross cuts and upraises thereon and, in accordance with the usual methods of mining, have carried on underground in said mines and properties extensive development work and that as a result thereof have discovered and opened up ground containing valuable copper and zinc bearing ores; that in acquiring and developing said mines and properties, the defendant and its predecessors in interest have expended several million dollars; that for many years the defendant was engaged in active mining on a part of said mining claims and real-

ized large returns and profits therefrom; that for several years last past the defendant and said predecessors in interest were engaged in active mining in other parts of said mining claims and realized some return therefrom; that during the last year and continuously from August, 1926, the defendant has been engaged in active mining operations on part of said properties known as the North Butte mine, by means of what are commonly known and termed as leasing operations and by such means have been mining and producing ores containing copper, zinc and silver and receiving returns therefrom; that as a result of such operations the defendant has been and now is producing in the neighborhood of 3700 tons of copper and zinc ores per month and that whether or not such operations are profitable depends largely upon the extent of such operations and the prices in the market of copper and zinc and that at the present time with the low prices of copper and zinc in the markets such operations are being conducted at a loss.

And on information and belief that there are considerable reserves of copper and zinc ores in the North Butte mine available for working by such leasing or other operations in the customary course of conducting the same; that said North Butte mine is fully equipped and is now in good working order and condition and from the development work therein with such equipment the defendant is in position to mine and produce upwards of 3700 tons monthly of ores carrying copper and zinc profitably when the prices for copper and zinc metals in the market are not less than 13½ cents per pound for copper and 7 cents per

pound for zinc and that the aforesaid leasing operations have been and are being conducted on the North Butte mine and by means of the Granite Mountain and Speculator shafts.

And on information and belief that the Main Range properties are partially developed and have ample equipment except pumping capacity for carrying on development and mining operations in said propertties but that before such development and mining operations can be conducted in said Main Range properties further exploratory and development work will need to be done and additional pumping capacity provided, and that since on or about February 18, 1926, the defendant has expended large sums of money in pumping water from said Main Range properties through said Main Range shaft and in keeping said shaft open for anticipated future development and mining operations upon said Main Range properties.

Upon information and belief, that the aggregate value of the said mines, mining claims and mining property, including all said equipment, machinery and appliances owned by said defendant is at least $8,500,000.00 and that said value is greatly in excess of all the debts and obligations of the defendant.

6. Upon information and belief, that the defendant also owns certain other personal property situate in the City of Butte, State of Montana, including cash in banks and accounts receivable, aggregating in value to the extent of but not exceeding $50,000, and that the defendant also owns certain other personal property situate in the City of Duluth, State of Minnesota, con-

sisting largely of shares of the capital stock of other corporations and which property is of the value of but not exceeding $100,000.

7. Upon information and belief, that the defendant at the time of the purchase of the properties of the Tuolumne Copper Company as hereinabove set forth, assumed and agreed to pay certain bonded indebtedness of said company, to wit:

(a) Indebtedness under that certain trust deed of date March 1, 1920, from Tuolumne Copper Mining Company, an Arizona corporation, the predecessor of Tuolumne Copper Company, to John E. Stephenson, of Butte, Montana, as trustee, which was recorded on said date at page 511, in Book 61 of the Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which deed of trust was given to secure an issue of First Mortgage Five-Year Convertible Gold Bonds with interest payable semi-annually at the rate of 7 per cent per annum from March 1, 1920, in the aggregate amount of $500,000.00, of which bonds there are now outstanding approximately $115,000.00 par value thereof; that said indebtedness is a first lien upon the properties acquired by the defendant by purchase from the Tuolumne Copper Company, as aforesaid, and the principal thereon is wholly past due and remains unpaid.

(b) Indebtedness under that certain deed of trust dated April 16, 1923, from said Tuolumne Copper Mining Company to John E. Stephenson, Trustee, which was duly recorded on April 18, 1923, at page 571 of Book 69 of the Mortgage Records of Silver Bow Coun-

ty, Montana, to which reference is hereby made for greater certainty, to secure an issue of ten-year Mortgage Convertible Gold Bonds with interest payable semi-annually at the rate of 7 per cent per annum from April 17, 1923, in the aggregate amount of $750,000.00, of which bonds at the time of such purchase, there were and now are outstanding $2,200.00 par value thereof.

(c) Indebtedness under that certain deed of trust dated January 7, 1924, from Tuolumne Copper Company to J. K. Heslett, of Butte, Montana, as Trustee, to secure an issue of ten-year mortgage convertible gold bonds with interest payable semi-annually at the rate of 7 per cent per annum, having an aggregate par value of $750,000.00, the lien of which latter deed of trust is subject to the liens of the deeds of trust of March 1, 1920, and April 16, 1923, above mentioned, and under which deed of trust of January 7, 1924, there were at the time of such purchase, bonds outstanding to the amount of $180,950.00 par value thereof. That since said purchase there have been retired of such outstanding bonds approximately $155,000.00 par value thereof and that there now remains outstanding of such bonds approximately $25,000.00 par value thereof; that the same constitute an indebtedness in the amount of such outstanding bonds in addition to the indebtedness due under the deeds of trust of March 1, 1920, and April 16, 1923; that the indebtedness under the foregoing deeds of trust constitutes liens upon all those properties of the defendant formerly owned by the Tuolumne Copper Company prior to the lien of the mortgages or deeds of trust next hereinafter described.

On information and belief, that the defendant heretofore duly made, executed and delivered a certain indenture of first mortgage to Central Union Trust Company of New York, as Trustee, dated January 2, 1926, and thereafter under date of January 2, 1927, made, executed and delivered a supplemental deed of trust to Central Union Trust Company of New York, as Trustee, which latter deed of trust was supplemental to the first mortgage dated January 2, 1926, and which said mortgage and supplemental deed of trust covered all the plant, mining property and equipment owned by the defendant in said Silver Bow County, Montana, subject to the deeds of trust as to the properties formerly owned by said Tuolumne Copper Mining Company and said Tuolumne Copper Company as above set forth; that said mortgage and supplemental deed of trust were given to secure certain first mortgage convertible sinking fund bonds with interest payable semi-annually at the rate of 7 per cent per annum from January 2, 1926, which bonds are due January 2, 1936, in the aggregate amount of $1,500,000.00, and of which bonds there have been duly issued, certified and are now outstanding approximately $364,000.00 par value thereof, which said mortgage was duly recorded July 14, 1926, at page 446 in Book 75 of Mortgage Records of Silver Bow County, Montana, to which reference is hereby made for greater certainty, and which supplemental deed of trust was duly recorded on January 25, 1927, on page 156 of Book 76 of Mortgage Records of Silver Bow County, Montana, and to which reference is hereby made for greater certainty.

Upon information and belief, that the defendant is indebted for wages of employees, mining expenses, equipment, mining and supplies, stamping and smelting charges and other miscellaneous charges and expenses and accounts in the aggregate amount of approximately $76,000.00, all of which indebtedness is past due and owing by the defendant to divers persons, partnerships and corporations, and that demand for the payment of which in full or in part has been and is being frequently made.

Upon information and belief, that the defendant has promissory notes outstanding due various banks and individuals aggregating approximately $75,000.00, a part of which are secured by its first mortgage bonds and a part of which are unsecured, and a part of which indebtedness is now past due and the balance of which will shortly mature.

Upon information and belief, that the defendant paid the interest due under the several deeds of trust, mortgages and supplemental deed of trust above mentioned on the dates when the same were last due, but that defendant has no cash or available quick assets with which to pay either the principal which is past due under the deed of trust of March 1, 1920, or the interest due under said deed of trust maturing September 1, 1927, or the interest due under the deed of trust of April 16, 1923, maturing October 16, 1927, or the interest under the deed of trust of January 7, 1924, maturing July 7, 1927, or the interest under the said deed of trust of January 2, 1926, and the said supplemental mortgage or deed of trust of January 2, 1927, maturing July 1, 1927.

8. That on or about March 1, 1927, the defendant duly made, executed and delivered to this complainant, for a valuable consideration, its promissory note wherein and whereby the defendant promised to pay to the complainant on or before June 1, 1927, the sum of $6500, together with interest thereon at the rate of 7 per cent per annum; that no part of said sum has been paid, although past due, and demand has been made upon the defendant by the complainant; that there is now due and owing on said note from the defendant to the complainant the sum of $6500, together with interest thereon at the rate of 7 per cent per annum from March 1, 1927.

9. Upon information and belief, that the defendant is at the present time without funds sufficient to meet its obligations past due or shortly to mature and is unable to borrow the money necessary for such purposes; that it has used its best endeavors to sell the unsold mortgage bonds secured by said mortgage of January 2, 1926, but that its efforts in that direction have been wholly unsuccessful; that many of said creditors are pressing for the payment of their debts, threatening suits and other proceedings; that employed at said mines at present are upwards of fifty employees; that defendant has no funds with which to pay said employees their current monthly wages and there are at least fifty creditors of the defendant each having claims of less than $500.00.

10. Upon information and belief, that all the authorized capital stock of the defendant consists of 1,000,000 shares of common stock of the par value of $10.00;

that there are issued and outstanding of such stock 640,000 shares, which shares are owned by approximately 6,000 stockholders.

11. Upon information and belief, that the inability of the defendant to meet its obligations, as hereinbefore alleged, is caused by its inability to sell more of said mortgage bonds, as aforesaid, or to raise moneys by any other method of refinancing, and with the funds therefrom to bring into production its East Side and Main Range properties.

12. Upon information and belief, that various creditors are pressing the defendant for the payment of their claims, as aforesaid, and unless the assets of the defendant are taken into judicial custody, actions at law may be instituted by said creditors, and through said actions said creditors may obtain judgments and executions, and inequitable preferences as against your complainant and other creditors may result. Moreover, through such actions and executions and possible sales under execution, irreparable injury will be done this complainant and other creditors of the defendant, besides the stockholders thereof, and the good will of the defendant's business will be lost, its ability eventually to proceed with the mining and operation of its said mining properties will be destroyed and the value of its said properties and assets will be irreparably impaired.

13. That the complainant has no adequate remedy at law.

14. That in order to avoid the contingencies above referred to and to preserve the business and assets of

the defendant and permit of the continuance of said business until sufficient funds can be obtained out of its assets by operation of its mines or by a reorganization of the defendant to provide for the payment of the liabilities, it will be necessary that the assets of the defendant be taken into judicial custody and administered by a court of equity and that all actions and proceedings in law including executions, attachments and other processes be enjoined; that in this way the property of the defendant can be protected and the rights of the complainant and other creditors equitably adjudicated.

Wherefore, for all these purposes and for the equal protection of the rights not only of your complainant and other holders of the promissory notes of the defendant, but of all its creditors, including holders of bonds which will not fall due for some time to come, as well as for the protection of the stockholders of the defendant whose property is in imminent danger of being wasted, the complainant alleges that the intervention of a Court of Equity is imperatively required and that a receiver or receivers should be appointed to take charge of all the assets of the defendant, wherever situate, and to conduct, manage, administer and, if advisable, carry on the business of the defendant and administer the assets thereof with all and singular the powers to be conferred upon him or them in the proposed decree herein submitted and until the final decree of the court in the premises.

15. The complainant further alleges that on the 8th day of June, 1927, he commenced in the District Court of the United States for the District of Minne-

sota, Fifth Division, a court of record having jurisdiction of the parties and of the subject matter, a suit in equity wherein he was and is the complainant and said North Butte Mining Company was and is the defendant and wherein and by the complaint therein substantially the same allegations were made as are made in and by this Ancillary Bill of Complaint, and wherein this complainant as such complainant prayed that a receiver or receivers be appointed in said suit in the District Court of the United States for the District of Minnesota, Fifth Division thereof; that thereafter, to wit, on the said 8th day of June, 1927, in said primary or original receivership suit so pending in said United States District Court for the District of Minnesota, Fifth Division, an order was made by the Hon. William A. Cant, District Judge, appointing John W. Neukom of Duluth, Minnesota, and Matt L. Essig of Butte, Montana, as receivers of said North Butte Mining Company.

A copy of said Bill of Complaint and a copy of said order in said suit are hereto attached, marked Exhibit "A" and Exhibit "B," respectively, and made a part hereof, and certified copies thereof and of the answer and consent of the defendant therein are filed herewith.

The complainant further alleges that from the nature of the business of the defendant and the necessity of intelligent mutual cooperation in said States of Minnesota and Montana in the administration of said receivership, it is desirable that the same receivers, if possible, shall be appointed and act in each jurisdiction.

16. In as much as the complainant has no adequate

remedy at law and can be relieved only in equity, the complainant files this bill of complaint in behalf of himself and of all other creditors of the defendant, and on behalf of all of the parties in interest as shall be entitled to and shall elect or be authorized to join in this action and prays for equitable relief as follows:

1. That a receiver or receivers be appointed to take charge of and manage the property and assets of the defendant, and that the Court forthwith confirm the appointment heretofore made by said United States District Court of Minnesota, Fifth Division, of John W. Neukom and Matt L. Essig as receivers of all and singular the property of said North Butte Mining Company.

2. That said receiver or receivers be authorized to take possession of the real and personal property of the defendant, its business, stocks of minerals and metals, machinery and equipment, stores, accounts and all the other assets of the defendant, and conduct the business of the defendant, if the same can be done profitably, operate said mines or any thereof, either by leasing operations or otherwise, sell and dispose of the products thereof and the metals derived therefrom, purchase and install such new machinery and equipment and supplies, and employ such agents, servants and workmen as may be necessary from time to time for the conduct of said business and the operation of said mines or any thereof until the further order of this Court.

3. That said receiver or receivers be authorized to demand, sue for, collect, receive and take into posses-

sion all of the goods, chattels, rights, credits, moneys, effects, books, papers, choses in action and all other property whatsoever of the defendant, and to institute and prosecute suits in law or in equity for the recovery of any assets, property, damages or demands belonging to or existing in favor of the defendant, and settle and compound all debts or other claims whatsoever of the defendant as in the judgment of such receiver or receivers may be advisable.

4. That all persons, firms and corporations be enjoined from levying execution upon, attaching, intermeddling with or taking possession of, any of the property of the defendant wherever situate.

5. That the officers, employees and servants of the defendent be enjoined from selling, transferring, disposing of or in any manner interfering with any of the property of the defendant or taking possession of the same or interfering with the said receiver or receivers in the performance of his or their duties.

6. That the officers, agents and employees of the defendant be required forthwith to transfer, convey, assign and deliver unto the said receiver or receivers or his or their duly authorized agents or representatives all the property and assets of the defendant and to take such action as may be necessary thereto.

7. That all persons, firms and corporations be enjoined from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant or from levying or serving any attachments or executions or other processes upon the de-

fendant or upon or against any of the property of the defendant, and generally that all persons, firms or corporations be enjoined from doing any act to interfere with said receiver or receivers in his or their possession, use or disposition of the property of the defendant.

8. That a writ of injunction issue out of and under the seal of this Honorable Court or issue by one of your Honors directing, enjoining and restraining the defendant and its officers, directors, agents and employees and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property of the defendant.

9. That this Honorable Court grant a writ of subpoena under the seal of said Court directed to the defendant and commanding it on a day certain therein named before this Honorable Court to answer (but not under oath, answer by oath being expressly waived) all and in the premises and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

10. That a decree appointing a receiver or receivers of the property of the defendant and granting the relief prayed for in this Ancillary Bill of Complaint may be granted by this Honorable Court in the form herewith submitted.

11. That the complainant Francis H. Hardy have judgment against the defendant for the sum of $6,500.00 with interest at the rate of seven per cent per annum from and after the 1st day of March, 1927; and that the rights of the said complainant creditor upon said

judgment, or under the indebtedness set out and alleged in this complaint, in connection with the rights of all other creditors, whether judgment creditors or general creditors, be established by an order and decree of this Honorable Court.

12. That at such time as may be found just and proper, the properties and assets of the said defendant may be ordered to be sold as an entirety, and in such manner and upon such terms and conditions as this Honorable Court shall deem just and equitable, or in due course of business, if it be found just and equitable, to continue the business until the same can be so disposed of, and that any such order of sale or disposition of said property may make proper and suitable disposition for all credits, rights, priorities and liens of the creditors of the defendant, and may and shall provide for a sale of the property of the defendants as an entirety, subject to and free and clear of all encumbrances, in such manner and upon such terms as this Honorable Court may direct, and that the proceeds of any such sale may be distributed amongst those entitled thereto, as this Honorable Court may adjudicate; and that the complainant may have such other, further and different relief in the premises as to this Honorable Court may seem proper, or might be necessary to fully and properly enforce the rights and credits of this complainant, and all credits of the stockholders, and in case of the sale of any or all of the property of the defendant it may be directed to make, execute and deliver to the purchaser or purchasers, deeds of sale and conveyance as may be necessary and proper to vest

in such purchaser or purchasers the title to all said property.

13. That upon the determination and adjustment of all the rights of the parties, and the sale and disposition of the property and assets of the defendant, and upon the payment either in full or *pro rata* of all its creditors said defendant corporation be dissolved and its affairs finally wound up, and the residue of its property, if any, be distributed among its stockholders as they may severally be entitled thereto.

14. That such order shall be made by this Honorable Court as to the service of this Bill of Complaint or any order that may be made in this suit as may be deemed sufficient and proper by this Court.

15. That the complainant have such other and further relief as the exigencies of the case may require and as to this Honorable Court may seem mete.

And your complainant will ever pray, etc.

FRANCIS H. HARDY,
Complainant.

By (Signed) WARREN E. GREEN,
800 Alworth Building, Duluth, Minnesota,

And

(Signed) EDWARD M. LAMB,
123 Pennsylvania Building, Butte, Montana.
His Solicitors.

(Verified by Edwin M. Lamb, Attorney.)

To this Bill of Complaint, the following answer was filed:

(Title of Court and Cause)

ANSWER

"To the Honorable, the Judges of the District Court of the United States, in and for the District of Montana:

"Now comes the defendant, North Butte Mining Company, in the above entitled cause, and submitting itself to the jurisdiction of this Court, for its answer to the Ancillary Bill of Complaint herein, admits each and every of the allegations contained in said Ancillary Bill of Complaint.

"NORTH BUTTE MINING COMPANY,
"By FREDERIC R. KENNEDY,
"Secretary.
"CARL J. CHRISTIAN,
"Solicitor for said Defendant."

(Verified by Frederic R. Kennedy, Secretary.)

The following is a copy (omitting title of court and cause) of the consent to appointment of receivers filed in the Minnesota Court, a certified copy of which was presented with the Bill of Complaint and Answer to the Montana Court:

"CONSENT TO APPOINTMENT OF RECEIVERS.

"Now comes the defendant in the above entitled matter and hereby consents to the appointment by the above entitled court in tthe above entitled cause, of John W.

Neukom, of Duluth, St. Louis County, Minnesota, and Matt L. Essig, of Butte, Silver Bow County, Montana, as receivers of and for the said defendant, North Butte Mining Company, and all of its property and assets.

"Dated at Duluth, Minnesota, this 8th day of June, A. D. 1927.

"NORTH BUTTE MINING COMPANY,
"By FREDERIC R. KENNEDY,
"Its Secretary."

(Verified by Frederic R. Kennedy.)

Stripped of all unnecessary verbiage, the Ancillary Bill of Complaint simply sets forth these facts:

That plaintiff is a resident of the State of Illinois, and that defendant is a corporation organized under the laws of Minnesota, organized for the purpose of and engaging in the mining business, with property in Minnesota and Montana.

That the value of defendant's properties is at least $8,500,000, which value is greatly in excess of its obligations. That defendant owns personal property in Montana, in addition to its mines, of the value of $50,000, and also personal property in Minnesota of the value of $100,000.

That defendant is without funds sufficient to meet its obligations past due or shortly to mature, and is unable to borrow the money necessary for that purpose.

That defendant's debts consist of $500,000 of bonds, $75,000 of notes and $76,000 current liabilities.

"That on or about March 1, 1927, the defendant duly made, executed and delivered to this complainant, for a valuable consideration, its promissory note wherein and whereby the defendant promised to pay to the complainant on or before June 1, 1927, the sum of $6500, together with interest thereon at the rate of 7 per cent per annum; that no part of said sum has been paid, although past due and demand has been made upon the defendant by the complainant; that there is now due and owing on said note from defendant to the complainant the sum of $6500, together with interest thereon at the rate of 7 per cent per annum from March 1, 1927."

As a conclusion it is alleged that "the complainant has no adequate remedy at law."

Upon these facts, admitted by the answer, it is asked by the complainant that a receiver be appointed of all of the defendant's property; that possession thereof be taken from the defendant and its officers, that the property of the company be sold, and its affairs wound up.

It is to be noted that the complainant is not a stockholder nor in any way interested in the corporation, so far as is shown by the complaint, but is a simple contract creditor, having no further interest than the payment of his claim.

Upon these allegations, the United States District Court for the District of Montana was asked to invoke its equitable jurisdiction in aid of the complainant.

EQUITABLE JURISDICTION OF FEDERAL COURTS.

> "It is well settled that the jurisdiction of the federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished, though all remedies be administered in a single action at law, and so far, at least, as form is concerned, all distinctions between equity and law be ended, yet the jurisdiction of the federal court, sitting as a court of equity, remains unchanged."
>
> Mississippi Mills v. Cohn, 150 U. S. 202; 14 Sup. Ct. 75; 37 Law Ed. 1052;

In the case of Payne v. Hook, 7 Wall, 425-430, quoted in the last named case, the Supreme Court of the United States said:

> "We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. *The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.*" (Italics ours.)
>
> "By the legislation of congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages

of equity having uniform operation in those courts wherever sitting."

Guffey v. Smith, 237 U. S. 120; 35 Sup. Ct. at p. 530.

It is, therefore, apparent that appellant's rights, whatever they may be, must be determined in accordance with and measured by the equity jurisdiction of the Federal courts, regardless of any state statute or decision to the contrary.

THE ONLY SUBSTANTIVE RIGHT OF A SIMPLE CONTRACT CREDITOR IS TO HAVE HIS DEBT PAID IN DUE COURSE. HE HAS NO RIGHT WHATEVER IN EQUITY UNTIL HE HAS EXHAUSTED HIS LEGAL REMEDY.

The appellant sets forth in his bill of complaint that the defendant is indebted to him on a promissory note, dated March 1, 1927, and due June 1, 1927, in the sum of $6500, with interest thereon at 7 per cent per annum; that no part of the indebtedness has been paid, although demand for payment has been made. (Par. 8 Bill.)

He does not allege that he has any lien on the property of the defendant which he has a right to enforce, and which requires the aid of a court of equity. His bill simply shows him to be a simple contract creditor, not otherwise interested in the defendant corporation.

"A receiver is often appointed upon the application of a *secured* creditor who fears that his security will be wasted. Kountze v. Omaha Hotel Co., 107 U. S. 378, 395, 2 Sup. Ct. 911, 27 L. Ed. 609. A

receiver is often appointed upon application of a *judgment creditor* who has exhausted his legal remedy. See White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. But an *unsecured simple contract creditor* has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. *This is true, whatever the nature of the property, and although the debtor is a corporation and insolvent.* The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. *He has no right whatsoever in equity until he has exhausted his legal remedy.* After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. Compare Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup Ct. 691, 37 L. Ed. 577; National Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Pierce v. United States, 255 U. S. 398, 403, 41 Sup. Ct. 365, 65 L. Ed. 697. He may, by such a bill, remove any obstacle to satisfy his execution at law, or may reach assets equitable in their nature, or he may provisionally protect the debtor's property from misappropriation or waste, by means either of an injunction or a receiver. Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied towards the satisfaction of substantive rights."

Pussey & Jones Co. v. Hanssen, 261 U. S. 491; 43 Sup. Ct. Rep. at p. 456.

See also Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77; 43 Sup. Ct. 480.

By these decisions of the Supreme Court of the United States it is apparent that the appellant, being only a simple contract creditor, without any lien upon the property of the defendant requiring the aid of a court of equity to enforce, has not brought himself by his Bill of Complaint within the jurisdiction of a court of equity, and it will leave him where it found him.

To the same effect see:

Felice Perrelli Canning Co. v. Certified Food Stores, 15 Fed (2nd) 891;

In re Richardson's Estate, 294 Fed. at p. 358;

Davis v. Hayden, 238 Fed. at p. 738;

Nowell v. International Trust Co. (9th Cir.) 169 Fed. 497;

Maxwell v. McDaniels, 184 Fed. 311.

In the Davis v. Hayden case, supra, the court said:

> "We take it to be an established principle of jurisprudence that a court of equity is *without power,* in the absence of statutory authority, to appoint a receiver of the assets of an individual debtor, or to enjoin the prosecution of claims against him, at the suit of a mere contract creditor, who has no lien or other security, and who asserts no right to subject any specific property to the payment of his debt. Equity may aid in a proper case when legal remedies have been exhausted, but cannot be resorted to in the first instance. The authorities to this effect are numerous and of uniform import." (At p. 738.)

We call the Court's attention, however, to the case of Matter of Reisenberg, 209 U. S. 90; 28 S. Ct. 229, 52 L. Ed. 403. In that case the question arose as to a

receivership of a New York City railway, the receivers having been appointed by consent and upon the application of an unsecured creditor. The court sustained the appointment, and used this language: "There are cases—and this one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their effort to enforce their claims, and to very great inconveniences to the many thousands of people who necessarily use the road every day of their lives. The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it." This case is not authority for the appointment made in the case at bar. There the interest of the public was at stake. Here the public is not concerned.

In the case of Hollins v. Brierfield Coal Co., 150 U. S. 371, 14 Sup. Ct. 127, the plaintiffs were simple contract creditors; their claims had not been reduced to judgment, and they had no lien. The Court held that it is settled law that such creditors cannot come into a court of equity to obtain the seizure of the debtor's property. However, in that case the court stated that

equitable defenses may be waived under certain conditions which did not exist in that case.

In Brown v. Lake Superior Iron Co., 134 U. S. 530, the court held that a demurrer to the bill, had it been interposed, must have been sustained, but it appeared that the proceedings had been had with the consent of the company, and the receivers permitted to go into possession of the property, enter into contracts, and assume large obligations without any intimation of lack of authority for a period of nine months, when the objection that the bill lacked equity was sought to be raised by the defendant. The court held that under such circumstances, the objections were waived and the defendant estopped. The facts in the case at bar are not at all similar to that case.

THE BILL OF COMPLAINT IS WANTING IN EQUITY.

The appellant's bill of complaint is wanting in equity for the further reason that it shows upon its face that the complainant has an adequate remedy at law, which he has not exhausted. He alleges (paragraph 13) that he has no adequate remedy at law, which is merely his conclusion. The facts, upon the face of his Bill, show that the defendant has property worth at least $8,500,000. In addition to that he alleges, and the answer admits, that the defendant has personal property situated in Butte, Montana, including cash in banks and accounts receivable, aggregating $50,000, and in the State of Minnesota it has securities of the value of $100,000. On

the very face of his bill, all he has to do is to secure a judgment in an action at law and issue an execution and get his money.

It is one of the very first principles of equity pleading that the bill must allege *facts* showing that the complainant has no plain, speedy or adequate remedy at law.

Pusey & Jones Co. v. Hansen, supra.

A RECEIVERSHIP CANNOT BE THE PRIMARY OBJECT OF LITIGATION.

Assuming that the complainant is acting in good faith in seeking a receivership over the property of the defendant situated in the State of Montana, his ancillary bill here amounts to nothing more than a desire on his part to administer the affairs of the defendant in a court of equity. No one has joined him in this venture. He is not a stockholder. He is not a lien-holder. He is not the holder of a judgment which he seeks to enforce. He does not advise the court that he has even attempted, much less exhausted, his remedy at law. He simply wants the United States District Court in Montana to take charge of and administer the affairs of the defendant company for fear its stockholders will not be able to properly do so.

> "It is well settled that, unless the rights of the plaintiff are such as to entitle her to relief in equity, she cannot ask for a receivership merely on the ground that under the guidance of the court the internal affairs of the corporation might be conducted in a manner more satisfactory to her. Receivership is an incident merely to proceedings in

equity involving the rights of parties, and is resorted to for the purpose of conserving the property and assets of the respondent pending adjudication of these rights. This court is *without jurisdiction* to take over the affairs of a corporation for the purpose of administering its internal affairs in conformity with the desires of a minority stockholder.

Wilson v. Waltham Watch Co., 293 Fed. 812;

Hawes v. Oakland, 104 U. S. 450;

Brictson Mfg. Co. v. Close, 280 Fed. 297.

CONSENT CANNOT CONFER JURISDICTION.

"It is, of course, axiomatic that the parties to a litigation cannot by consent confer jurisdiction to a court of a case over which it otherwise would not have jurisdiction. Hence, an appointment of a receiver in a case in which the *pleadings do not state a cause for such an appointment will not be validated by the fact that the litigants have consented to it.*"

Tardy's Smith on Receivers, 2nd Ed. Vol. 1, p. 63;

Elliott v. Superior Court (Cal.), 145 Pac. 103;

Vila v. Grand Island Elec. Co., 68 Neb. 222; 110 Am. St. Rep. p. 400; 63 L. R. A. 791;

Baker v. Varney (Cal.) 62 Pac. 100.

First National Bank of Auburn v. Superior Court, 107 Pac. p. 322;

Lewis v. Shaw, 246 Pac. 86.

The rule is well stated by the Supreme Court of the United States in Railway Company v. Ramsey, 22 Wal. 326, as follows:

"Consent of parties cannot give the courts of the United States jurisdiction, but the parties may ad-

mit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission."

In the case of Zuber v. Micmac Gold Mining Co., 180 Fed. p. 627, we find the following:

"In this district, in Hutchinson v. American Palace-Car Co. (C. C.) 104 Fed. 182, 185, Judge Putnam has stated the three essential conditions, compliance with which is necessary to justify the appointment of a receiver:

"First, that the case be fairly within the jurisdiction of the court having in view both the limited jurisdiction of federal tribunals and the true nature of proceedings in equity;

"Second, that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case; and

"Third, that the circumstances calling for a receiver be of a clear and urgent character.

"Judge Putnam further observes that upon application for receivership, *even though the parties have already agreed upon a receiver,* the court is not relieved from looking at the question of jurisdiction, and from inquiring whether the application for receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership for the mere sake of a receivership."

Where the court has jurisdiction to appoint a receiver in a particular case, the appointment may proceed upon the consent of the parties interested, and in such case the appointment is not invalid on the ground that the defendant entered his appearance voluntarily and answered admitting the allegations of the complaint (In re Richardson's Estate, 294 Fed. 358). The admissions in the answer simply avoided the necessity of proof,

and did not and could not enlarge the jurisdiction or power of the court.

But, as was said in the case of Slayton v. Crittenden County, 284 Fed., at page 865, It is elementary that courts of equity will not appoint receivers for the mere asking, even when consented to by the defendant, when there is no warrant of law for such a consent by the person consenting. A receiver may only be appointed in extraordinary cases, when absolutely necessary for the protection of the rights of the parties asking it, and when there is no adequate and complete remedy at law.

IN THE CASE AT BAR, THERE WAS NO CONSENT TO RECEIVERSHIP.

While the record in the case shows that at the time of the filing of the bill of complaint in the Montana jurisdiction, a certified copy of a so-called consent was also presented to the court, it is apparent from the document that it was the act of the secretary only. There is nothing in the pleadings or record to show that it even purports to be the act of the corporation. We know of no rule of law by which the secretary of a corporation has the power to consent that the property of the corporation may be taken from the management of its officers and stockholders and placed in the hands of a receiver. There is no allegation in the bill that at any meeting of the board of directors, regularly held, or called for that purpose, or otherwise, the secretary was authorized to do this unusual act. And we doubt very much if the board of directors of a going concern

would have the power to consent that the property of the corporation be taken from the control of the board and stockholders and placed under the control of a receiver. Such a proceeding is not contemplated by any corporate purpose; it is never found in a charter, and we never heard of it in a by-law.

> "An officer of a corporation cannot admit inability to pay its debts and signify the willingness of a corporation to be adjudged bankrupt, unless authorized by a resolution passed at a meeting of the stockholders or directors."
>
> Collier on Bankruptcy (13th Ed.), Vol. 1, p. 180;
>
> In re Burbank, 168 Fed. 719;
>
> In re Community Book Co. v. Beach, 10 Fed. (2nd) 616;
>
> In re Farrell Realty Co. 10 Fed. (2nd) 612.

> "As a general rule, a corporation can appear to defend a litigation only in its corporate capacity represented by its properly constituted officers. (Central Union Trust Co. v. Marietta, 48 Fed. 14.) So, where a suit is brought against a corporation, it is ordinarily within the discretion of the directors whether or not to defend. General Electric Co. v. West Ashville Imp. Co., 73 Fed. 386. *There is no presumption of authority in an officer to make and file a voluntary petition in bankruptcy,* and he may not do so without the consent of the directors. In re Jefferson Casket Co., 182 Fed. 689; in re Southern Steel Co., 169 Fed. 702."
>
> Regal Cleaners v. Merles, 274 Fed. 916.

A proceeding in bankruptcy contemplates the winding up of the affairs of the corporation, but not more so

than the proceeding here instituted and complained of, for it is here sought to sell and dispose of all of the property of the defendant. Its property and the management thereof is taken from the officers and stockholders, the owners thereof, and placed in the hands of a court at the simple behest of an unsecured contract creditor, acting with the consent of the secretary of the company. There is no presumption in favor of such acts, and there is no allegation in the bill that Mr. Kennedy acts otherwise than as secretary or by any other authority or direction than his own.

See Walters v. Anglo-American Mortgage Co., 50 Fed. 316.

In the case of Citizens Bank v. Hargraves, 164 Fed. at p. 612, Judge Gilbert, speaking for this court, said: "It is well settled that, in the absence of a statute enlarging its powers, a court of equity has no jurisdiction at the suit of a shareholder or other private person to dissolve a corporation. (Citing cases.) Nor has a stockholder in a corporation any standing to apply for a receiver to control a corporation or wrest from it its corporate property on the ground that the business of the corporation is managed unwisely or unjustly * * *. It is true that the bill in this case does not in terms pray for the dissolution of the corporation, but there can be no question that such is incidentally the effect of placing a corporation in the hands of a receiver."

A RECEIVERSHIP IS AN EXTRAORDINARY REMEDY TO BE GRANTED WITH CAUTION.

"The appointment of a receiver, on account of the serious consequences arising from an improvident exercise of this power, is hedged with all of the rules formulated by courts of equity as guides in the exercise of the powers which must necessarily be inherent in a court of equity."

Tardy's Smith on Receivers (2nd Ed.), p. 24.

"The exercise of the extraordinary power of a chancellor in appointing receivers, as in granting writs of injunction *ne exeat,* is an exceedingly delicate and responsible duty, to be discharged by the court with the utmost caution, and only under such special circumstances as demand summary relief."

High on Receivers, 4th Ed., Sec. 3, p. 6;

Slayton v. Crittenden, 284 Fed. p. 865.

"It is recognized by all the authorities that the appointment of a receiver is a drastic remedy, and is never granted if there be other relief not so severe."

Brictson Mfg. Co. v. Close, 280 Fed. at p. 301;

United States v. Honolulu, 249 Fed. 167;

Joseph Dry Goods Co. v. Hecht, 120 Fed. 760;

Tallman v. Ladd, 5 Fed (2nd) 582.

THE SAME RULE WHICH APPLIES TO A NATURAL PERSON APPLIES TO A CORPORATION.

In the absence of statutory enlargement of equity jurisdiction, a receiver of a corporation will not be ap-

pointed unless the same relief would be given, when claimed in an action against a natural person.

Vila v. Grand Island Co. (Neb.), 94 N. W. 136, 97 N. W. 613; 110 Am. St. Rep. p. 400.

COURTS WILL NOT TAKE POSSESSION OF PROPERTY FOR THE PURPOSE OF RE-ORGANIZING BUSINESS.

"Property in receivership is in the custody of the court, and while the court may approve a reorganization of the business affairs of the property which it holds in receivership, made and agreed to by those who are interested in it, we do not understand that it is the duty or province of a court to take into its possession and hold the business affairs of others for the primary purpose of reorganizing that business."

Dold Packing Co. v. Doerman, 293 Fed. 315.

ANCILLARY RECEIVERS; WHO DETERMINES RIGHT TO APPOINT?

The court whose *aid is invoked* must *alone* determine whether the case is a proper one for the appointment of an ancillary receiver. It cannot act intelligently, and therefore cannot tell what, in comity, it ought to do unless reasonable information has been communicated to it concerning the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceedings in which the receiver was appointed in the court of primary jurisdiction.

Bluefields v. Steele, 184 Fed. at p. 588.

If the court to which application is made for the appointment of an ancillary receiver could not determine for itself whether the case presented facts warranting such an appointment, there would be no necessity of making application to the court. The clerk might make the order, if merely perfunctory.

> "Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals."
>
> Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485; 20 Sup. Ct. at p. 710.

RIGHT TO RELIEF DEMANDED MAY ALWAYS BE CHALLENGED.

It is elementary that one who prays for any preliminary relief may always be challenged as to the sufficiency of his alleged cause of action, and the case may then be considered as upon a motion to dismiss on the ground that the bill does not set forth any cause of action entitling the plaintiff to the relief demanded.

Des Rees v. Costaguta, 275 Fed. at p. 175.

AUTHORITY OF COURT TO ANNUL ORDER OF APPOINTMENT.

The creation of the receivership was the act of the Court and not of an individual judge, and a judge of a court may revoke an order previously made by another judge of the same court.

Tardy's Smith on Receivers, 2nd Ed., Sec. 786, p. 2112;

Taintor v. St. John, 50 Mont. 358; 146 Pac. 939.

"The equitable principle that gives a court jurisdiction to appoint a receiver in the first place, gives it also the power to terminate the receivership upon a showing affecting the propriety of the original action of the court."

Tardy's Smith on Receivers, 2nd Ed., Sec. 786; p. 2109.

"If the original order was for any reason absolutely void, it, like any other void judicial order, is of no effect, cannot be of protective benefit to any one presuming to act under it, and may be

abrogated at any time by the court of its own motion or on the suggestion of any person."

Tardy's Smith on Receivers, 2nd Ed., Sec. 786;

Wiencke v. Bibby, 113 Pac. 876;

State ex rel Ridgley v. Superior Court, 150 Pac. 1153;

High on Receivers, 4th Ed., Sec. 39c, p. 55.

The court likewise has power to vacate the order on the score of improvidence or inadvertence in the making of the order.

Tardy's Smith on Receivers, 2nd Ed., Sec. 786;

Bassett v. Bickford Bros. Co., 232 Fed. p. 895;

Walters v. Anglo-American Mtg. Co., 50 Fed. 316.

And an order vacating a receivership may be made by an appellate court on an appeal from the order appointing the receiver. If the appellate court concludes that the appointment was wrongfully made because of an insufficient showing, that court may issue a mandatory order directing the revocation of the appointment.

Tardy's Smith on Receivers, 2nd Ed., Sec. 787, p. 2113;

New Albany Waterworks v. Louisville Banking Co., 122 Fed. 776.

The court may remove the receiver where it is convinced that it has exceeded its authority in making the appointment.

Wiencke v. Bibby, 113 Pac. 876.

And the appointment should be annulled in cases where it is useless and cannot accomplish the purpose intended.

Krotz v. Louisiana Const. Co., 45 So. 276.

The lower federal courts are not bound by the decisions of a federal court of co-ordinate jurisdiction, or even the decisions of a federal Circuit Court of Appeals in another circuit. Courts are not mere machines to register and follow the opinions and decisions of some other court, unless that other court be one of appellate power in the same jurisdiction.

Continental Securities Co. v. Interborough R. Co., 165 Fed. 945, 959.

In the absence of a decision by a court, whose judgment is authoritative on the court trying the case, every judge must exercise his best judgment, and decide legal questions submitted to him in accordance with his own views, when, after a careful consideration of the law, he reaches the conclusion that to follow the decision of some other judge would result in misconstruction of the law and miscarriage of justice.

United States v. United Shoe Mach. Co., 264 Fed. 138, 175;

Vandergift & Co. v. United States, 173 Fed. 609;

Norwich Union v. Stanton, 191 Fed. 813.

The question here presented is not one of *res adjudicata* or "law of the case"; it is, did the lower court have the right to correct or nullify its former decision or

holding (whether made by Judge McNary or Judge Bourquin, or some other judge is immaterial) when convinced that it had been improvidently or erroneously made, or was it required, after being convinced of such a situation, to permit the order to stand as made?

It is settled law of these United States that all judgments, decrees, or other orders of the courts, *however conclusive in their character,* are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

> Bronson v. Schulten, 104 U. S. at p. 415;
> Doss v. Tyack, 14 Howard, 297; 20 Dec. of Sup. Ct. 189.

This is exactly what happened in this case. The lower court, Judge McNary presiding, entered an order appointing receivers. At the same term, the same court, Judge Bourquin presiding, after hearing on order to show cause, vacated and set aside the order. This the court had a right to do.

Judge McNary was called in to sit as presiding judge on account of the absence of Judge Bourquin. He appointed the receivers. Judge McNary acted as judge of the court. He was not the Court, nor is Judge Bourquin the Court. The Court is an impalpable something, an Institution of Justice established by the people, of which the judge is simply an officer. Judges pass away, but the Institution remains.

We do not understand that it is contended that Judge

McNary could not, if called back to sit in the case, have revoked the appointment of the receivers had he on further deliberation concluded that the Bill was without equity and that the Court was without jurisdiction, with or without consent, to make the order and that the order was improvidently entered.

Yet it is contended that the Court, acting through Judge Bourquin, the judge, is powerless to revoke the order of the Court because it was entered by Judge McNary.

By this reasoning the Judge of another district is made higher than the Court, and no matter whether the Court had jurisdiction or not, the original order of Judge McNary must stand.

Judge Pray is the other District Judge of Montana—co-ordinate with Judge Bourquin. We can well assume that had he made the order, instead of Judge McNary, comity might require that having made the order originally it might be unseemly for Judge Bourquin to reverse it for the reason that such a course might tend to cause confusion and uncertainty and undesirable conflict between the judges of the district. If Judge Pray originally made the order, he properly would have considered and passed upon the matter of its revocation, but no such case is presented here.

Judge McNary and Judge Bourquin present no such relation to the Montana District Court as Judge Pray and Judge Bourquin.

Judge McNary sat in the place of Judge Bourquin. He was not co-ordinate with Judge Bourquin in the sense that Judge Pray is co-ordinate with him. There

is no possibility of conflict between them in their different jurisdictions.

Can receivers be retained, as contended by appellant, and the wrecking of a great concern with assets admittedly many times greater than its liabilities, with no suits pending against it, be accomplished simply because a judge of another district improvidently made the order and thereby tied the hands of the court? We think not.

Is the idea of comity greater than justice itself?

Is it not the wiser doctrine that the righting of a judicial error, which can result in untold injury to a large body of stockholders, is of much greater importance in the eyes of the law than the prevention of a difference of opinion between two judges of different judicial districts?

This court will decide this matter in accordance with the law and equities of the case and the rights of the parties; for such purposes courts are instituted.

The holdings of stockholders in this large corporation will not be wiped out by a refinement of reasoning concerning the question of comity existing between judges of different judicial districts.

We feel that it is not out of place to call the Court's attention to this state of the record:

We find the defendant became indebted to the complainant on March 1, 1927, on a promissory note amounting to $6500, which note matured June 1, 1927. Demand was made for payment. By June 8th, 1927,

the complainant had secured the appointment of receivers of all of the property of the defendant situated in Minnesota. By the 10th of the same month, he had likewise secured the appointment of the same persons receivers of all the property of the defendant in Montana, and this notwithstanding the defendant had $100,000 worth of personal property in the State of Minnesota out of which the complainant could be paid upon simply securing a judgment for his debt. We quote further from the opinion of Judge Bourquin: "It is noted that plaintiff verified the original complaint on June 3, 1927, and in Illinois; that Warren E. Greene of the Alworth building, Duluth, is his counsel; that Kennedy verified the answer and consent on June 8, 1927, in Duluth, and William E. Tracy of the building aforesaid is the defendant's counsel; that very expeditiously and on June 10, 1927, Greene, Kennedy and Neukom appeared in the proceedings in Butte; and that Essig is a $300 per month clerk in defendant's Butte office." Further, the consent of the secretary is to the appointment of certain persons as receivers. It is not a general consent. Also, in paragraph 12 of the bill of complaint, the complainant prays "that at such time as may be found just and proper, the property and assets of the said defendant may be ordered to be sold as an entirety, and in such manner and upon such conditions as this Honorable Court shall deem just and equitable, or in due course of business, if it be found just and equitable, to continue the business until the same can be disposed of" to the end that the purchaser acquire a title thereto free of encumbrance.

These facts, all appearing on the face of this record, make this proceeding unusual, and justify the order of Judge Bourquin.

We respectfully submit that the Bill of Complaint is without equity, and that the order should be affirmed.

CHARLES R. LEONARD,
J. A. POORE,
Amici Curiae.

No. 5277

United States

Circuit Court of Appeals

For the Ninth Circuit.

5

LESLIE-CALIFORNIA SALT COMPANY, a Corporation, Claimant of the American Steamship "PYRAMID," Her Engines, etc.,
Appellant,

vs.

D. L. LARKIN, Owner of the American Gasboat "FOUR SISTERS," Her Engines, etc.,
Appellee.

APOSTLES ON APPEAL.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Index.

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,191.

D. L. LARKIN,

Libellant,

vs.

The American Steamship "PYRAMID," Her Engines, etc.,

Respondent;

LESLIE-CALIFORNIA SALT COMPANY, a Corporation,

Claimant and Cross-Libellant;

The American Gas Boat "FOUR SISTERS," Her Engines, etc.,

Cross-Respondent.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

Please prepare the apostles on appeal in the above-entitled action, containing the following:

1. All documents and data required by subdivision 1 of Section 1 of Rule IV of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

2. All pleadings, with the exhibits annexed thereto.

3. The opinion of the Court herein.

4. The interlocutory decree herein.
5. The notice of appeal herein.
6. The assignments of error herein. [1*]
7. The stipulation and order respecting the exhibits on appeal, and the bonds on appeal.

Dated, San Francisco, California, this 13th day of July, 1927.

HAROLD M. SAWYER and
ALFRED T. CLUFF,
Proctors for Claimant and Cross-Libelant.
DANIEL W. EVANS,
Of Counsel.

[Endorsed]: Copy of the within is hereby admitted on this 13th day of July, 1927.

BELL & SIMMONS,
Attorneys for Larkin Transp. Co.

Filed Jul. 14, 1927. [2]

[Title of Court and Cause.]

STATEMENT OF CLERK UNDER RULE IV.

PARTIES.

Libelant: D. L. Larkin.
Respondent: The American S. S. "Pyramid," etc.
Claimant and Cross-libellant: Leslie-California Salt Co., a Corp.
Cross-respondent: The American Gasboat "Four Sisters," etc.

*Page-number appearing at the foot of page of original certified Apostles on Appeal.

PROCTORS.

BELL & SIMMONS, Esqs., for Libelant and Cross-respondent.

HAROLD M. SAWYER, Esq., ALFRED T. CLUFF, Esq., and DANIEL W. EVANS, Esq., for Claimant and Cross-libelant. [3]

PROCEEDINGS.

1927.

Jan. 18. Filed libel for collision.

Issued monition for the attachment of the S. S. "Pyramid," which was returned with the following return of the U. S. Marshal endorsed thereon:

"In obedience to the within Monition, I attached the American S. S. "Pyramid" therein described, on the 18 day of Jan. 1927, and have given due notice to all persons claiming the same that this Court will, on the 1st day of Feby. 1927, (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein-named S. S. "Pyramid." I further return that I handed to and left with Capt. A. D. Thompson a

copy of this Writ, at San Francisco, Calif., this 20 day of Jan. 1927.

FRED L. ESOLA,
United States Marshal.
By E. H. Gibson,
Deputy.

San Francisco, Cal. Jan. 20, 1927."

Filed claim of Leslie-California Salt Co. to S. S. "Pyramid."

Filed admiralty stipulation for the release of the "Pyramid" in the sum of $1500.00.

Feb. 1. Proclamation duly made — claimant granted 10 days to plead.

10. Filed answer to libel.

Filed Cross-libel by Leslie-California Salt Co.

Issued monition for *attached* of Gas boat "Four Sisters" on cross-libel, which bears the following endorsement:

"In obedience to the within monition, I attached the Gas Boat 'Four Sisters' therein described, on the 10th day of Feb. 1927, and have given due notice to all persons claiming the same that this Court will, on the 1st day of March, 1927, (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter, proceed to trial and condemnation thereof, should no claim be interposed for the same.

I further return that I posted a notice of seizure on the herein-named Gas Boat 'Four Sisters.'

FRED L. ESOLA,
United States Marshal.
By E. H. Gibson,
Deputy.

San Francisco, Cal., Feb. 10–27." [4]

Feb. 14. Filed admiralty stipulation for the release of the "Four Sisters" in the sum of $1500.00.

16. Filed claim of D. L. Larkin to the "Four Sisters."

Mar. 1. Proclamation duly made on the cross-libel.

4. Filed answer to cross-libel.

Apr. 13. Hearing had and cause submitted, Honorable George M. Bourquin, Judge.

14. Filed opinion. Ordered that a decree be entered in favor of libelant.

May 24. Filed testimony.

July 7. Filed interlocutory decree.

11. Filed notice of entry of decree.

14. Filed notice of appeal.

Filed assignment of errors.

Filed cost bond on appeal.

Filed praecipe for apostles. [5]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,191.

D. L. LARKIN,

Libelant,

vs.

The American Steamship "PYRAMID," Her Engines, etc.,

Respondent.

LIBEL FOR COLLISION.

To the Honorable, the Judges of the Above Court:

The libel of D. L. Larkin, libelant, an individual, against the steamship "Pyramid," her engines, boilers, tackle, apparel, furniture and equipment (all of which are hereinafter included when reference is made to said steamship), and against all persons intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:

I.

At all times herein mentioned libelant was a resident of Alameda, California, and owner of the gas boat "Four Sisters," whereof one H. B. Hampton was and is master. Said gas boat was and is an American vessel built of wood of the burden of 38.-95 gross tons, or thereabouts, of the length of 58.5 feet, the breadth of 20.5 feet and the depth of 4.5 feet, or thereabouts.

II.

The steamship "Pyramid" herein proceeded against, was and is an American vessel built of wood, of the burden of [6] 603.77 gross tons, or thereabouts, of the length of 161 feet, the breadth of 27.5 feet and the depth of 7 feet, or thereabouts, and is now afloat on the navigable waters of San Francisco Bay or its tributaries, and within the territorial jurisdiction of this Honorable Court.

III.

At the time of the collision hereinafter referred to, the "Four Sisters" was being operated by the Larkin Transportation Co., a corporation organized and existing under and by virtue of the laws of the State of California, on a basis whereby said corporation employed and paid the crew of said vessel and paid all expenses of operation and paid to Libelant a percentage of her earnings.

Heretofore said corporation duly assigned to libelant all of its rights and claims against the "Pyramid" arising out of the hereinafter mentioned collision and Libelant is now the owner thereof.

IV.

On Saturday morning, October 2, 1926, the "Four Sisters" having been moored to the southerly side of pier number 23 on the waterfront of San Francisco, left such pier, bound for Oakland, and upon moving from said pier, and while yet in the dock or slip between said pier 23 and pier 21, gave one long blast of her whistle. In proceeding out of said dock or slip, the course of the "Four

Sisters'' was parallel to the northerly side of pier 21, and nearer thereto than to the southerly side of pier 23, and she proceeded thereon very slowly. There was no answer to said whistle, and the course ahead of the ''Four Sisters'' was clear. The weather was clear and fair. [7]

V.

As the ''Four Sisters'' slowly approached the easterly end of pier 21, on said course, and when only a very short distance from said end of pier 21, the bow of the ''Pyramid'' suddenly, and without any warning signal, moved swiftly into view from behind said easterly end of pier 21, crossing the said course of the ''Four Sisters'' at right angles from the latter's starboard to her port, at a high rate of speed. The course of the ''Pyramid'' was parallel with the easterly end line of pier 21, and not more than twenty-five feet distant therefrom.

VI.

As soon as the bow of the ''Pyramid'' moved into view from behind the easterly end of pier 21, the ''Four Sisters,'' *in extremis,* in an endeavor to avoid collision, swung her head to port, hard over, and went full speed astern, which was the only thing that could be done to avoid collision; but the ''Pyramid'' did not change her course or alter her speed, and with her stem, with great force, at about 7:45 o'clock A. M. on said October 2, 1926, struck the ''Four Sisters'' amidships on her starboard side, splintering and breaking the main clamp, two strakes of her ceiling, breaking and pushing one

frame out of place, straining the starboard bulwark and rail, splintering and breaking the covering board for about 20 feet, also five hull planks, and her upper and lower guard timbers, and starting all the calking in and about the damaged planking.

VII.

Just as the "Pyramid's" stem struck the "Four Sisters," the former blew several blasts on her whistle which were the first whistles blown by her. The "Pyramid" did not alter either her course or her excessive speed before she struck, but, on the contrary, carried the "Four Sisters" along on her bow for a long [8] distance after striking her, and was still on a course parallel to the pier-end line after she had passed the easterly end of pier 23.

VIII.

Said collision was in no way due to any fault on the part of the "Four Sisters," which was in all respects carefully and properly managed, but was solely due to faults on the part of the "Pyramid," in that she was proceeding on a course parallel with the pierhead line and too close thereto for safety, and in violation of the rules and regulations of the Board of State Harbor Commissioners of the Port of San Francisco, to wit, of Item 200 of Section Seven thereof providing that "vessels must not run within five hundred (500) feet from and parallel to the pierhead line"; and in that she was proceeding at excessive speed under the circumstances; and in that she did not keep out of the way of the "Four Sisters"; and in that she did not answer

or give proper heed to the aforesaid long whistle blast of the "Four Sisters," or give any signals prior to the collision; and in that she did not, prior to said collision, have any proper watch or lookout; and in that she did not change her course to her starboard or slacken her speed or stop or reverse prior to striking the "Four Sisters" or for a long time thereafter; and in that she was in other and further respects, of which libelant is not at present advised, improperly and carelessly navigated.

IX.

By reason of said collision and the damage to the "Four Sisters" resulting therefrom, and by reason of the repairs necessitated thereby, and by reason of the delay of said vessel and the frustration of the voyage of said vessel, libelant and his assignor have been damaged in the sum of $1,159.10, no part of which has been paid. [9]

X.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law and according to the practice of this Honorable Court, may issue against said steamship "Pyramid," her engines, boilers, motors, tackle, apparel, furniture and equipment, and that she may be condemned and sold to answer for the damages alleged in this libel; and that this Court will be pleased to decree to libelant the damages aforesaid, with interest and costs, and for such

other and further relief in the premises as in law and justice it may be entitled to receive.

BELL & SIMMONS,
Proctors for Libelant.

D. L. LARKIN,
Libelant. [10]

United States of America,
Northern District of California,—ss.

D. L. Larkin, being first duly sworn, deposes and says:

That he is the libelant in the above-entitled libel; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

D. L. LARKIN.

Subscribed and sworn to before me this 18th day of January, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 18, 1927. [11]

[Title of Court and Cause.]

ANSWER TO LIBEL.

To the Honorable, the Judges of the District Court of the United States, for the Northern District of California:

Leslie-California Salt Company, a corporation,

claimant of the American steamer "Pyramid," respondent herein, answering unto the libel of D. L. Larkin herein, admits, denies and alleges as follows:

I.

That it has no information or belief sufficient to enable it to answer the allegations, or any of them, of Article I of said libel, and therefore calls for strict proof of said allegations and each of them, if relevant.

II.

Admits the allegations of Article II of said libel.

III.

That it has no information or belief sufficient to enable it to answer the allegations, or any of them, of Article III of said libel, and therefore calls for strict proof of said [12] allegations and each of them, if relevant.

IV.

Answering the allegations of Article IV of said libel, admits that on Saturday morning, October 2d, 1926, the gas boat "Four Sisters" was moored on the southerly side of pier 23 on the waterfront of San Francisco; admits that said gas boat left such pier; denies that upon moving from said pier, or at any other time or place or while yet in the dock or slip between pier 23 and pier 21, or elsewhere, or at all, said gas boat gave one long blast or any other blast or blasts of her whistle, or any other signal; denies that in proceeding out of said dock or slip, the course of the "Four Sisters" was

parallel to the northerly side of pier 21, and in this connection alleges that the said gas boat, in coming out of said slip bore down upon the northeasterly end of pier 21; admits that the course of the "Four Sisters" was nearer to the northerly side of pier 21 than to the southerly side of pier 23; denies that the "Four Sisters" proceeded on such course very slowly or slowly; denies that any whistle or whistles were ever given by the "Four Sisters" and denies that the course ahead of the said gas boat was clear; admits that the weather was clear and fair.

V.

Answering the allegations of Article V of said libel, denies that the "Four Sisters" slowly approached the easterly end of pier 21; denies that her course was parallel to the north side of pier 21; denies that the bow of the "Pyramid" moved swiftly into view or at a high rate of speed or without any warning or other signal or signals; admits that said vessels were on crossing courses; denies that said courses were at right angles; admits that the starboard side of the "Four Sisters" was to the port side of the "Pyramid"; admits that the course of the "Pyramid" was parallel to the easterly end of pier 21; denies that said [13] vessel or said course were not more than 25 feet distant therefrom.

VI.

Answering the allegations of Article VI of said libel, denies that as soon as the bow of the "Pyramid" moved into view, or at any other time or at

all, the "Four Sisters," in an endeavor to avoid collision, or for any other purpose, swung her head to port or elsewhere, or went full speed astern, or that in any other respect she changed her course or speed; denies that the "Pyramid," at said time and place, did not change her course or alter her speed; admits that the two vessels collided about 7:45 A. M. on said day; denies that the "Pyramid," with her stem or otherwise, struck the "Four Sisters" with great or any force amidships on her starboard side, or splintered or broke the main clamp or two strakes of her ceiling, or broke or pushed one frame out of place, or strained the starboard bulwark or rail, or splintered or broke the covering board for about 20 feet, or at all, or five hull planks, or her upper or lower guard timbers, or any of them, or started the calking in or about the planking; denies that said planking, or any other part of said boat, was damaged.

VII.

Answering the allegations of Article VII of said libel, denies that just as the "Pyramid" stem struck the "Four Sisters" the former blew several blasts on her whistle, and in this connection alleges that prior to the collision, and as soon as the "Pyramid" sighted the "Four Sisters," the "Pyramid" blew several blasts on her whistle as a danger signal; denies that said signal was the first blown by the "Pyramid"; denies that the "Pyramid" did not alter her course or speed before the collision; denies that her speed was excessive; denies that after the collision she carried the "Four Sisters"

on her bow for a long or any [14] distance at all; denies that the "Pyramid" was still on a course parallel to the pierhead line after she passed the eastern end of pier 21.

VIII.

Answering the allegations of Article VIII of said libel, denies that said collision was in no way due to any fault on the part of the "Four Sisters"; denies that the "Four Sisters" was in all or in any respects carefully or properly managed; denies that said collision was due solely or at all to any fault or faults on the part of the "Pyramid"; denies that the "Pyramid's" course was too close to the pierhead line for safety; denies that the "Pyramid" violated the rules and regulations of the Board of State Harbor Commissioners of the port of San Francisco; denies that the "Pyramid" violated item 200 of Section 7 thereof providing that "vessels must not run within 500 feet from and parallel to the pierhead line"; denies that there is such a rule; denies that the Board of State Harbor Commissioners of the port of San Francisco ever made such a rule; denies that the "Pyramid" was proceeding at an excessive rate of speed under the circumstances; denies that the "Pyramid" did not keep out of the way of the "Four Sisters"; denies that a long whistle blast or any blast or blasts or any other signal was ever given by the "Four Sisters"; denies that the "Pyramid" did not give any signals prior to the collision; denies that the "Pyramid" did not have a proper watch or lookout prior to said collision; denies that

the "Pyramid" did not change her course or slacken her speed or stop or reverse prior to the collision or for a long or any time thereafter; denies that the "Pyramid" was in any respect or respects improperly or carelessly navigated.

IX.

Answering the allegations of Article IX of said libel [15] denies that the "Four Sisters" was damaged by reason of said collision or at all, or that any repairs were necessitated thereby or that she was delayed or that her voyage was frustrated; denies that libellant or his assignor have been damaged in the sum of $1,159.10, or in any other sum by reason of said collision.

X.

Answering the allegations of Article X of said libel, denies that all and singular or all or singular the premises are true, but admits that if true, they would be within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering said libel, and as a further and separate defense thereto, respondent and claimant allege:

I.

That a collision between the steamer "Pyramid" and the gas boat "Four Sisters" occurred at about the hour of 7:45 A. M. on October 2d, 1926, in San Francisco Bay at a point near the northeasterly end of pier 21 on the San Francisco waterfront; that the circumstances of said collision are as follows:

On said day, at about the hour of 7:35 A. M., the steamer "Pyramid," being then and there moored on the northerly side of pier 17 on the San Francisco waterfront, left her moorings for the purpose of proceeding to the southerly side of pier 25 to deliver cargo to another vessel. As she left her moorings she sounded one blast on her whistle and then backed out into the stream to a point about 70 feet away from the end of pier 17, where she backed and turned so that her bow was headed to the north. She then started ahead, proceeding at a very slow rate of speed. As she came ahead she sounded a second warning blast of her whistle. At all the times herein mentioned there were two men on watch in [16] her bow.

Thereafter, proceeding very slowly and cautiously as aforesaid, the steamer "Pyramid" continued on her course until she reached a point about abreast of the easterly end of pier 21 and about 60 or 70 feet distant therefrom. At said time and place and without any warning whatsoever, the gas boat "Four Sisters" came suddenly into view about 100 feet away, proceeding at a very high rate of speed, coming apparently from a mooring place on the southerly side of pier 21 at the inshore end, and bearing down upon the northeasterly end of pier 21. The "Pyramid" immediately sounded a four blast danger signal on her whistle. Her engines were immediately put full speed astern and her helm was put to port. The "Four Sisters," however, came on rapidly without reduc-

ing her speed or sounding any whistles, and the two vessels collided. The stem of the "Pyramid" came in contact with the "Four Sisters" on her starboard side about amidships. Thereafter the "Four Sisters" proceeded on and went clear of the "Pyramid." As a result of the collision, the "Pyramid's" stem was broken and splintered and she was otherwise damaged and injured. At all the times hereinabove mentioned the weather was fair and clear.

II.

That the collision was in no way due to any fault on the part of the "Pyramid," her officers or crew, but on the contrary, was due solely to the fault of the said gas boat "Four Sisters," and to the carelessness and negligence of her master and crew in the following respects:

1. In that in leaving her moorings at said dock or pier, the said gas boat "Four Sisters" utterly failed to navigate with the care and prudence required under the circumstances.

2. In that the said gas boat "Four Sisters" utterly failed to sound the regulation signals required of a vessel of [17] her type and class under the then existing conditions, or any signals.

3. In that the said gas boat "Four Sisters" utterly failed to heed or pay attention to the signals duly sounded by the "Pyramid."

4. In that the said gas boat "Four Sisters" was not equipped with a proper or adequate or efficient whistle, as required by law for vessels of her type and class.

5. In that the said gas boat "Four Sisters" did not have on watch proper and competent officers or members of the crew.

6. In that the said gas boat "Four Sisters," prior to and at the time of the said collision, was running at a rate of speed which was excessive under the circumstances.

7. In that the gas boat "Four Sisters" and her officers and crew were negligent in other and further particulars of which claimant and respondent is not at present advised but of which it begs leave to offer proof as and when advised, and to amend its answer accordingly.

WHEREFORE, respondent and claimant prays that said libel may be dismissed and that it may have judgment for its costs incurred herein and for such other relief as may be meet and proper in the premises.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Claimant and Respondent.
DANIEL W. EVANS,
Of Counsel. [18]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Vernon S. Hardy, being first duly sworn, deposes and says:

That he is an officer, to wit, the treasurer of Leslie-California Salt Company, the claimant named in the foregoing answer; that he makes this

verification on behalf of the said corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be upon information and belief, and as to such matters that he believes it to be true.

VERNON S. HARDY.

Subscribed and sworn to before me this 10th day of February, 1927.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within is hereby admitted on this 10th day of February, 1927.

BELL & SIMMONS,
Attorneys for Libelant.

[Endorsed]: Filed Feb. 10, 1927. [19]

In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,191.

D. L. LARKIN,

Libellant,

vs.

The American Steamship "PYRAMID," Her Engines, etc.,

Respondent,

LESLIE-CALIFORNIA SALT COMPANY, a Corporation,

Claimant and Cross-Libellant,

The American Gas Boat "FOUR SISTERS," Her Engines, etc., .

Cross-Respondent.

CROSS-LIBEL FOR COLLISION.

To the Honorable, the Judges of the District Court of the United States, for the Northern District of California:

The cross-libel of Leslie-California Salt Company, a corporation, as owner of the steamer "Pyramid" against the gas boat "Four Sisters," her engines, tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of collision civil and maritime, respectfully alleges:

I.

That Leslie-California Salt Company was and is a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, and that it is, and at all the times herein mentioned was, the owner of the American steamer "Pyramid," an American vessel of 457 net tons, and that it operated said steamer on San Francisco Bay and its tributaries. [20]

II.

That the gas boat "Four Sisters" is an American gas boat of 31.54 net tons and is now afloat on the waters of San Francisco Bay or its tribu-

taries and within the jurisdiction of this Honorable Court.

III.

That on the 2d day of October, 1926, at about the hour of 7:45 A. M., a collision occurred between the said steamer "Pyramid" and the said gas boat "Four Sisters" in the waters of San Francisco Bay at a point near the northeasterly end of pier 21 on the San Francisco waterfront; that as a result of said collision the stem of the "Pyramid" was broken and splintered and she was otherwise damaged and injured.

IV.

That the circumstances of said collision are as follows:

On said day, at about the hour of 7:35 A. M. the steamer "Pyramid," being then and there moored on the northerly side of pier 17 on the San Francisco waterfront, left her moorings for the purpose of proceeding to the southerly side of pier 25 to deliver cargo to another vessel. As she left her moorings she sounded one blast on her whistle and then backed out into the stream to a point about 70 feet away from the end of pier 17, where she backed and turned so that her bow was headed to the north. She then started ahead, proceeding at a very slow rate of speed. As she came ahead she sounded a second warning blast of her whistle. At all the times herein mentioned there were two men on watch in her bow.

Thereafter, proceeding very slowly and cautiously as aforesaid, the steamer "Pyramid" con-

tinued on her course until she reached a point about abreast of the easterly end of pier 21 and [21] about 60 or 70 feet distant therefrom. At said time and place and without any warning whatsoever, the gas boat "Four Sisters" came suddenly into view about 100 feet away, proceeding at a very high rate of speed, coming apparently from a mooring place on the southerly side of pier 21 at the inshore end, and bearing down upon the northeasterly end of pier 21. The "Pyramid" immediately sounded a four-blast danger signal on her whistle. Her engines were immediately put full speed astern and her helm was put to port. The "Four Sisters," however, came on rapidly without reducing her speed or sounding any whistles, and the two vessels collided. The stem of the "Pyramid" came in contact with the "Four Sisters" on her starboard side about amidships. Thereafter the "Four Sisters" proceeded on and went clear of the "Pyramid." As a result of the collision, the "Pyramid's" stem was broken and splintered and she was otherwise damaged and injured. At all the times hereinabove mentioned the weather was fair and clear.

V.

That the collision was in no way due to any fault on the part of the "Pyramid," her officers or crew, but on the contrary, was due solely to the fault of the said gas boat "Four Sisters" and to the carelessness and negligence of her master and crew in the following respects:

1. In that in leaving her moorings at said dock or pier, the said gas boat "Four Sisters" utterly failed to navigate with the care and prudence required under the circumstances.

2. In that the said gas boat "Four Sisters" utterly failed to sound the regulation signals required of a vessel of her type and class under the then existing conditions, or any signals.

3. In that the said gas boat "Four Sisters" utterly failed to heed or pay attention to the signals duly sounded by the [22] "Pyramid."

4. In that the said gas boat "Four Sisters" was not equipped with a proper or adequate or efficient whistle, as required by law for vessels of her type and class.

5. In that the said gas boat "Four Sisters" did not have on watch proper and competent officers or members of the crew.

6. In that the said gas boat "Four Sisters," prior to and at the time of the said collision, was running at a rate of speed which was excessive under the circumstances.

7. In that the gas boat "Four Sisters" and her officers and crew were negligent in other and further particulars of which cross-libellant is not at present advised, but of which it begs leave to offer proof as and when advised, and to amend its cross-libel accordingly.

VI.

That by reason of said collision and the damage to the "Pyramid" resulting therefrom, and by reason of the repairs necessitated thereby and by

reason of the delay of said vessel and the frustration of her voyage, the cross-libellant has been damaged in the sum of $1,205.25, no part of which has been paid and for which the cross-libellant prays reparation with interest thereon from the date of the collision.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the cross-libellant prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the [23] cross-respondent gas boat, her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment of the damages aforesaid, with interest and costs; and that the said cross-respondent gas boat may be condemned and sold to pay the same, and that said cross-libellant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Claimant and Cross-libellant.
DANIEL W. EVANS,
Of Counsel. [24]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Vernon S. Hardy, being first duly sworn, deposes and says:

That he is an officer, to wit, the treasurer of Leslie-California Salt Company, the cross-libelant named in the foregoing cross-libel; that he makes this verification on behalf of the said corporation; that he has read the foregoing cross-libel and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated to be upon information and belief, and as to such matters that he believes it to be true.

VERNON S. HARDY.

Subscribed and sworn to before me this 10th day of February, 1927.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 10, 1927. [25]

[Title of Court and Cause.]

ANSWER TO CROSS-LIBEL.

To the Honorable, the Judges of the Above Court:

D. L. Larkin, claimant of the American gas boat "Four Sisters," cross-respondent herein, answering

unto the cross-libel of Leslie-California Salt Company herein, admits, denies and alleges as follows:

I.

That he has no information or belief sufficient to enable him to answer the allegations of Article I of said cross-libel and therefore calls for strict proof of each and every one of said allegations, if relevant.

II.

Admits the allegations of Article II of said cross-libel. [26]

III.

Answering the allegations of Article III of said libel, admits the same, with the exception that he has no information or belief sufficient to enable him to answer the allegation that as a result of said collision the stem of the "Pyramid" was broken and splintered and she was otherwise damaged and injured, and placing his denial upon that ground, denies that as a result of said collision the stem of the "Pyramid" was broken or splintered or that she was otherwise damaged or injured.

IV.

Answering the allegations of Article IV of said libel, denies that as the "Pyramid" left her moorings she sounded her whistle; denies that as she came ahead she sounded a second or any warning blast of her whistle; denies that at all or any of the times mentioned in said cross-libel there were two men on watch in the bow of the "Pyramid"; denies that the "Pyramid" proceeded at a very slow or a slow rate of speed; with respect to the

other allegations in the first paragraph of said Article IV of said cross-libel, alleges that he has no information or belief sufficient to enable him to answer the same and placing his denial upon that ground, denies each and every one of said allegations and calls for strict proof thereof if relevant.

Denies that the steamer "Pyramid" proceeded very slowly or slowly or cautiously until she reached a point about abreast of the easterly end of pier 21 and about 60 or 70 feet distant therefrom; denies that at said alleged time and place the "Four Sisters" came into view without any warning; denies that at said alleged time and place the "Four Sisters" came suddenly into view about 100 feet away; denies that at said alleged time or place or at any time or place on said day the "Four [27] Sisters" was proceeding at a very high or a high rate of speed; denies that at said alleged time or place the "Pyramid" immediately sounded a four blast or any danger or other signal on her whistle; denies that the "Pyramid's" engines were immediately or at all put full speed or at all astern; denies that her helm was put to port; denies that the "Four Sisters" came on rapidly; denies that the "Four Sisters" came on without reducing her speed or without sounding any whistles; admits that the stem of the "Pyramid" came into contact with the "Four Sisters" on her starboard side about amidships; admits that thereafter the "Four Sisters" proceeded on and went clear of the "Pyramid"; alleges that he has no in-

formation or belief with respect to the allegations concerning damage to the "Pyramid" sufficient to enable him to answer them, therefore placing his denial upon that ground denies that the "Pyramid's" stem was broken or splintered or that she was otherwise damaged or injured and calls for strict proof thereof if relevant; admits that at all the times mentioned the weather was fair and clear.

V.

Answering the allegations of Article V of said cross-libel, denies that the alleged collision was in no way due to any fault on the part of the "Pyramid," her officers or crew; denies that the alleged collision was due solely or at all to the fault of the "Four Sisters" or other carelessness or negligence of her master or the crew in any respect whatsoever; denies that the "Four Sisters" was at fault in any respect; denies that the master or crew of the "Four Sisters" was careless or negligent in any respect.

Denies that the "Four Sisters" failed in any respect to navigate with the care and prudence required under the circumstances in leaving her moorings [28]

Denies that the "Four Sisters" failed to sound the regulation signals required of a vessel of her type and class under the then existing conditions; denies that the "Four Sisters" failed to sound any signals or signal, and on the contrary, alleges that she sounded all of the regulation signals.

Denies that the "Pyramid" sounded any signals or any signal; denies that the "Four Sisters" failed

to heed or pay attention to any signals sounded by the "Pyramid."

Denies that the "Four Sisters" was not equipped with the proper or adequate or efficient whistle as required by law for vessels of her type and class, and on the contrary, alleges that her whistle was in all respects proper, adequate and efficient.

Denies that the "Four Sisters" did not have on watch proper or competent officers or members of the crew, and on the contrary, alleges that her watch was in all respects proper and competent.

Denies that the "Four Sisters" prior to or at the time of said collision was running at a rate of speed which was excessive under the circumstances or at all, and alleges on the contrary that the speed of the "Four Sisters" prior to the time of said collision was very slow and at the time of said collision she had practically no way upon her.

Denies that the "Four Sisters" or her officers or crew were negligent in any or in other or further particulars of which cross-libelant was or is not advised; and on the contrary alleges that neither the "Four Sisters" nor her officers nor her crew were negligent in any particulars whatsoever.

VI.

Answering Article VI of said cross-libel, denies that by reason of said collision the "Pyramid" was damaged; [29] denies that any repairs to the "Pyramid" were necessitated by said collision or that she was delayed or her voyage frustrated thereby; denies that by reason of the alleged damage to the "Pyramid" resulting therefrom or by

reason of the repairs necessitated thereby or by reason of any delay of said vessel or any frustration of her voyage, cross-libelant has been damaged in the sum of one thousand two hundred five and 25/100 dollars ($1,205.25), or in any sum whatsoever.

VII.

Answering the allegations of Article VII of said libel, denies that except as herein expressly admitted, all or singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering said cross-libel and as a further and separate defense thereto, respondent and claimant refers to his original libel herein against the "Pyramid" and here realleges all of the allegations therein contained, hereby expressly referring to said original libel and making it a part hereof and incorporating it as a further and separate defense to the cross-libel herein.

WHEREFORE, respondent and claimant prays that said cross-libel may be dismissed with costs, and that libelant's prayer in his original libel may be granted and for such other and further relief as may be meet and just.

BELL & SIMMONS,
Proctors for Respondent and Claimant. [30]

United States of America,
Northern District of California,—ss.

D. L. Larkin, being first duly sworn, deposes and says:

That he is the respondent and claimant named in the foregoing answer to cross-libel; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

D. L. LARKIN.

Subscribed and sworn to before me this 4th day of March, 1927.

[Seal] GEORGE REID TUTTLE,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer to cross-libel is admitted this 4th day of March, 1927.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Cross-libelant.

[Endorsed]: Filed Mar. 4, 1927. [31]

[Title of Court and Cause.]

TESTIMONY.

Wednesday, April 13, 1927.

Counsel Appearing:

For Libelant: GOLDEN W. BELL, Esq.
For Respondent: D. W. EVANS, Esq.

Mr. BELL.—If your Honor please, this is a collision case, a collision between two vessels on the San Francisco waterfront, and, that being the

case, I would suggest before the proceedings begin it would be desirable to exclude the witnesses on both sides. Generally, these cases give rise to conflict, and I think they should be excluded.

The COURT.—I do not think so.

Mr. BELL.—The libel was filed by the Larkin Transportation Company, the owner of the "Four Sisters," a vessel the length of which is 58 feet and the breadth about 20 feet, against the steamship "Pyramid," a vessel owned by the Leslie-California Salt Company, the length of which was about 161 feet and her breadth about 27 feet; at the time of the collision the "Four [32] Sisters" was owned by Mr. D. L. Larkin, the libelant, and was being operated by the Larkin Transportation Company, and in the libel it has been alleged that an assignment has been made of the interests of the Larkin Transportation Company to the libelant, D. L. Larkin. The collision occurred on Saturday morning, October 7, of 1926, under these circumstances: The "Four Sisters," owned by Mr. Larkin, was moored on the south side at pier 23, San Francisco; that pier is northward of the Ferry Building. The piers to the north of the Ferry Building are numbered by odd numbers; therefore, she being moored to the south side of pier 23, between 23 and 21, she left that morning, giving one blast whistle, according to the rules required, and proceeded slowly out of that slip parallel to the lines of the sides of the wharf. As she approached the end of pier 21, the bow of the "Pyramid" suddenly loomed from behind the end of the pier,

the "Pyramid" being proceeding parallel to the pier end and within a very short distance of it, within 20 or 21 feet. Immediately, the "Four Sisters" attempted to drive her bow to port to avoid the collision, and backed, but she was unsuccessful in the maneuver, and was struck about amidships by the "Pyramid" and seriously damaged. The faults alleged on the part of the "Pyramid" are that she was proceeding on a course parallel to the pierhead line, and within 50 feet from and parallel to that line contrary to the rule of the State Board of Harbor Commissioners, which requires that vessels must not run within 500 feet from and parallel to the pierhead line.

Aside from that rule, under the circumstances she was proceeding too close to that pierhead line and at too great a speed.

That, in brief, is a statement of libelant's case. Of course, libelant was made a party by the owners of the "Pyramid" against the Larkin Transportation Company; the two matters are [33] pending; I don't know whether counsel for the other side desires to make a statement with relation to the cross-libel before I begin.

Mr. EVANS.—Of course, I will simply state the movements of the "Pyramid" before the collision, relied upon by us in defense and in charging the fault against the "Four Sisters." The "Pyramid" was moored at pier 17, about three piers to the south of the place where the collision occurred. She left that pier to go to pier 25, which was on the other side of the place where the collision oc-

curred, a distance of approximately 1000 feet. She left her pier, proceeded out slowly, backed and went ahead; she backed two or three times, and at the time of the collision she was actually proceeding at a speed of about 3 miles an hour. She gave her two whistles before she reached the end of pier 21, where the collision occurred, and she had two men on watch on her bow. She heard no whistle from the "Four Sisters" and her impression of the speed of the "Four Sisters" is that she was leaving the wharf at an excessive rate of speed. We charge that the "Four Sisters" had no lookout, that she left her pier without giving a timely or a proper signal, and that she was proceeding at at an excessive rate of speed under the circumstances.

With reference to the charge that we violated the rules of the Harbor Board in running too close to the pierhead, it is our contention that that rule does not apply in the present instance.

We also intend to refute the evidence, or the allegation, or the charges that we were running too fast and failed to give the proper signal.

The COURT.—Is there a cross-libel? [34]

Mr. EVANS.—A cross-libel and also a response to the cross-libel.

The COURT.—They are separate suits?

Mr. EVANS.—No; all one case.

TESTIMONY OF JAMES BYRNE, Jr., FOR LIBELANT.

JAMES BYRNE, Jr., called for the libelant, sworn.

Mr. BELL.—Q. What is your occupation?

A. Assistant Secretary of the Board of Harbor Commissioners.

Q. How long have you been with the Board?

A. 32 years.

Q. Do you know, in your capacity of Secretary, whether or not any rules exist passed by the Board of Harbor Commissioners with respect to the distance vessels are to proceed parallel to and off pierhead lines? A. Yes.

Q. What was that rule in 1926?

A. 500 feet.

Q. Can you state that rule to the Court in words, in the language of the rule itself, Mr. Byrne?

A. That no vessel operated by steam shall run within 500 feet parallel to the end of the piers.

Q. How long has that rule been in effect?

A. It has been in effect 30 years and over.

Q. Have you any publications in which that rule appears?

The COURT.—Is there going to be any dispute over this rule?

Mr. EVANS.—No dispute over the existence of the rule.

The COURT.—If you have the rule in writing, introduce it.

(Testimony of James Byrne, Jr.)

Mr. BELL.—I should like to have the witness refer to the rule and give the Court the exact language of it.

A. Vessels must not run within 500 feet from and parallel to the pierhead line.

Mr. BELL.—That is all.

Cross-examination.

Mr. EVANS.—Q. Is that rule enforced with respect to vessels changing their berths a short distance away? [35]

Mr. BELL.—Objected to as calling for the conclusion of the witness.

The COURT.—The objection will be sustained.

Mr. EVANS.—If your Honor please, Mr. Byrne is an officer of the Harbor Commissioners—

The COURT.—I know, but you are asking if it is enforced.

Mr. EVANS.—He certainly should know if that rule is enforced.

Mr. BELL.—It is immaterial whether it is or not.

The COURT.—If you can show any action by the Board which provides that this rule does not apply to vessels passing from berth to berth, that may be a different matter. The objection is sustained.

Mr. EVANS.—Has the Board of Harbor Commissioners ever interpreted that rule?

Mr. BELL.—The same objection.

The COURT.—You may answer, it is preliminary.

Mr. EVANS.—Has the Board ever interpreted

(Testimony of James Byrne, Jr.)

that rule in any way, shape or form as to what it does mean?

A. They have notified various vessels that run within that limit that that was their rule and asked them to observe it.

Q. Under what circumstances?

Mr. BELL.—The same objection, immaterial, irrelevant and incompetent.

The COURT.—Overruled; if not competent the Court will not give it any consideration.

A. Vessels that operate like the "Harvard" and "Yale" and those that would create a wash, and disturb the vessels that are tied to the piers. [36]

Mr. EVANS.—Q. Navigating under what circumstances—for a long distance along the pierhead line?

A. Yes.

Q. Has a complaint ever been brought to your attention regarding vessels running a shorter distance along the pierhead line?

A. Not a short distance; no.

TESTIMONY OF F. J. LARKIN, FOR LIBELANT.

F. J. LARKIN, called for the libelant, sworn.

Mr. BELL.—Q. What is your occupation?

A. Manager of the Larkin Transportation Company.

Q. How long have you held that position?

A. Since they were incorporated in 1920.

(Testimony of F. J. Larkin.)

Mr. BELL.—It is admitted that D. L. Larkin owned the "Four Sisters," and we admit that the Leslie Salt Company owned the "Pyramid."

Mr. EVANS.—That is correct.

Mr. BELL.—It is also admitted that the Larkin Transportation Company is a corporation, and that the Leslie Salt Company is a corporation?

Mr. EVANS.—That is correct.

Mr. BELL.—Q. What, if any, relationship did the Larkin Transportation Company have in 1926 to the "Four Sisters"?

A. They were operating it under charter.

Q. From whom? A. From D. L. Larkin.

Q. D. L. Larkin, the owner of the vessel?

A. Yes.

Q. Was that a written or oral charter?

A. That was an oral charter.

Q. What were the provisions of that charter?

A. The provisions of that charter were that the Larkin Transportation Company should operate and have full control of the "Four Sisters" paying 15 per cent of the gross receipts.

Q. And the wages of the crew and expenses were paid by whom? [37]

A. All expenses paid by the Larkin Transportation Company.

Q. After this collision was any assignment ever made by the Larkin Transportation Company to D. L. Larkin?

A. Yes, the Larkin Transportation Company made an assignment to D. L. Larkin.

(Testimony of F. J. Larkin.)

Q. I show you this assignment, Mr. Larkin. Is that the assignment that was made? A. Yes.

Mr. BELL.—I offer that in evidence, if your Honor please, as Libelant's Exhibit 1.

The COURT.—Admitted.

(The document is marked Libelant's Exhibit 1.)

Mr. BELL.—Q. Mr. Larkin, was the "Four Sisters" inspected by the United States Department of Inspection?

A. It was.

Q. What requirements with respect to officers and crew were required? A. One operator.

Q. One operator? A. Yes, one operator.

Q. Anyone else? A. No one else.

Q. I show you a document entitled Certificate of Inspection.

The COURT.—Is there any issue over this, any dispute about it?

Mr. BELL.—I am not sure.

Mr. EVANS.—It just came to my attention.

The COURT.—Is there any issue in the pleadings that involve this question?

Mr. BELL.—Yes, they claim that our vessel was improperly manned because she did not have more than one man on board

Mr. EVANS.—No, I have made no such allegation. I am willing to let this go in.

Mr. BELL.—I will offer this in evidence.

Q. This inspection was made and this certificate issued by the United States officials?

A. It was. [38]

(Testimony of F. J. Larkin.)

(The document is marked Libelant's Exhibit 2.)

Q. Such certificate was in existence at the time of the collision? A. Yes, yearly inspection.

Q. I show you a picture and ask you if the small vessel in the picture is the "Four Sisters"?

A. Yes.

Mr. BELL.—I offer that in evidence so the Court may have some idea of the character of the vessel involved.

(The document is marked Libelant's Exhibit 3.)

Q. Were you present on the vessel or on the wharf at the time the collision occurred, Mr. Larkin?

A. I was not.

Mr. BELL.—That is all.

Mr. EVANS.—No questions.

TESTIMONY OF H. B. HAMPTON, FOR LIBELANT.

H. B. HAMPTON, called for the libelant, sworn.

Mr. BELL.—Q. What is your occupation?

A. I am operator on the vessel "Four Sisters."

Q. How long have you been operator on that vessel? A. About 3 years.

Q. What had been your occupation prior thereto?

A. Well, running other vessels and engineer on her.

Q. What papers, if any, do you hold?

A. I carry an engineer's license, and also an operator's license.

Q. An operator's license to operate such vessels as the "Four Sisters"? A. Yes.

(Testimony of H. B. Hampton.)

Q. Were you on board the "Four Sisters" in October when the collision occurred between that vessel and the "Pyramid"? A. Yes.

Q. Where was the "Four Sisters" lying the morning of October 2, 1926?

A. On the south side of pier 26 well up by the bulkhead.

Q. Any other vessel lying at the dock?

A. The "Henrietta," just ahead of me. [39]

Q. Will you tell what transpired as you started out that morning?

A. Well, I pulled out of there at about half speed, and as I proceeded out of the slip I blew a long blast of the whistle, and the flood tide was gradually sweeping me down on the end of pier 21, and as I neared the end, the bow of the "Pyramid" suddenly bobbed around the end of the wharf.

Q. How close was the "Pyramid" to the end of pier 21?

A. Not more than 20 or 25 feet.

Q. When you saw the bow of the "Pyramid" suddenly appear behind that pier, what, if anything, did you do?

A. I attempted to swing over to port and back up.

Q. Then what happened?

A. We both kept going ahead naturally with the head wheel on the boats and we came together.

Q. How did you come together?

A. The "Pyramid" struck me about amidship.

(Testimony of H. B. Hampton.)

Q. What, if any damages was done by the collision to your boat?

A. About 5 planks, and the frame, and the covering board and guard were all broken.

Q. What is the size of those timbers which were broken?

A. About 3x12, 4x12.

Q. Prior to the collision, did you hear any whistle from the "Pyramid"?

A. Just before we struck she blew four blasts.

Q. How long before you struck was that?

A. That was very little before—it pretty near happened together.

Q. After you had come together, what did you do and what did the "Pyramid" do?

A. The "Pyramid" kept on going ahead and did not back up until after we struck.

Q. Any change in the course of the "Pyramid" before the collision? A. Apparently not.

Q. How was the wind on that morning, Captain?

A. There was a North wind, about 5 or 6 miles an hour.

Q. Blowing from the north?

A. Blowing from the north.

Q. What was the condition of the tide that morning? [40]

A. Flood tide; it was about an hour and a half before high water.

Q. Where were you, Captain, from the time that you left the wharf until the time of the collision?

A. In the pilot-house.

(Testimony of H. B. Hampton.)

Q. What did you do after the collision; where did you go? A. I went to Oakland.

Q. You proceeded on, did you, across the bay?

A. Yes.

Q. Do you know where the "Pyramid" went?

A. Yes, she went in to pier 25; we drifted around there for a while until I saw her go into the wharf and then we proceeded on to Oakland.

Mr. BELL.—That is all.

Cross-examination.

Mr. EVANS.—Q. When you were lying at the dock, Captain, you were well up to the bulkhead?

The COURT.—What do you mean you were well up to the the bulkhead?

A. Up close to the Embarcadero, the shore side.

Mr. EVANS.—May it please the Court, I have a photostatic enlargement of the chart here. This represents pier 21 and here is 23. Where were you lying?

A. Right in here.

Q. Right up against the bulkhead?

A. Right in close there.

Q. Where was the "Henrietta" lying?

A. Right in here.

Q. How large a vessel was the "Henrietta"?

A. She was about 58 feet long, I believe.

Q. When you came out, just show us your course.

A. I came out this way naturally to clear the "Henrietta" and was right about there.

Q. What were you doing, backing?

(Testimony of H. B. Hampton.)

A. No, I was going ahead.

The COURT.—Proceed and show your course.

A. I came out this way and the tide was gradually setting me over here a little bit, I saw I had plenty of room to clear the end of the wharf, and when I got right about in here somewhere the "Pyramid" bobbed around the corner.

Mr. EVANS.—Q. How far away from pier 21 were you, [41] Captain, approximately?

A. 30 feet; something like that.

Q. When you left here you were going at half speed? A. Yes.

Q. What is half speed on your vessel?

A. About 5 miles an hour.

Q. Did you change your speed at all as you came down here? A. No.

Q. You maintained a steady speed, half speed?

A. Yes.

Q. Where did you blow your whistle?

A. About in here.

Q. About half way down? A. Yes.

Q. Regarding your whistle, is it an efficient whistle? A. Yes.

Q. How does it operate? A. By air.

Q. From tanks or by the engine?

A. From tanks; the engine pumps the air up into the tanks.

Q. Do you know what pressure you had in the tanks that morning?

A. I always had over 60 pounds.

Q. Has the whistle been inspected recently?

(Testimony of H. B. Hampton.)

A. Yes.

Q. Did it require any repairs? A. No.

Q. It is a regular gas boat whistle? A. Yes.

Q. Did you have anybody on the lookout or on the bow as you came out? A. No.

Q. How many men were on board that morning?

A. There were 4.

Q. Where were the men placed?

A. Two of them were down below; they were not placed anywhere.

Q. Where were they on board?

A. Two down below and one standing on the after deck.

Q. One on the after deck? A. Yes.

Q. What is the approximate distance between your pilot-house and the bow of your boat?

A. Maybe 40 feet right to the bow.

Q. Forty feet from the pilot-house to the bow?

A. Yes.

Q. Were the windows of your pilot-house open or closed? A. The front one was always open.

Q. When you saw the "Pyramid" about how far away from you was she?

A. Not more than 75 feet. [42]

Q. Had she already come around the corner?

A. I just saw her bob around the corner.

Q. Where did the collision take place?

A. About here.

Q. Was it about 100 feet out from the wharf?

A. Possibly. The "Pyramid" was coming kind of in this way.

(Testimony of H. B. Hampton.)

Q. How far down the slip were you when you first saw her? A. About in here.

Q. How far would you say that would be?

A. Not more than 75 feet.

Q. Seventy-five feet down? A. Yes.

Q. You collided about 100 feet out? A. Yes.

Q. You say that when you hit the "Pyramid" she was not backing at that time? A. Yes.

Q. By that you mean she did not have any backward motion?

A. Her wheel was not going back.

Q. Could you see the wheel from where you were?

A. Yes.

Q. When did you hear the four blasts?

A. Just before we struck.

Q. How far away from you was the "Pyramid" at that time, roughly? A. Maybe 2 feet.

Q. Then you heard the four blasts? A. Yes.

Q. You heard no whistle before that? A. No.

Q. Where was the damage to your boat when you finally had it surveyed? Was it toward the bow or toward the stern?

A. No, it was right where she struck.

Q. In that area? A. Right in there.

Q. It did not exert itself one way or the other?

A. No.

Q. At what angle did the boat strike?

A. Thirty-five degrees, approximately.

Q. Between the bows?

A. Yes, an angle like that. [43]

Q. If we could illustrate it here, say this is the

(Testimony of H. B. Hampton.)

"Pyramid" coming along here and this is the "Four Sisters."

A. She struck at about that angle.

Q. You were getting across the bow?

A. Yes, I was attempting to swing so as to hit a glancing blow.

Q. After you collided what happened? Which way did the "Pyramid" go?

A. The "Pyramid" started to back up and I twisted back in the gear, I was still backing, and she pulled back in here and then I went in this way and out.

Q. Was your boat going forward or backward at the time of the collision?

A. I was still going forward.

Q. You still had headway on her? A. Yes.

Q. What is the custom on the waterfront with regard to shifting the berths of a vessel that wants to go from 17 to 21, from 2 to 3 docks?

Mr. BELL.—It is objected to as calling for the conclusion of the witness.

The COURT.—He may answer. For the sake of the record, the objection is overruled.

Mr. EVANS.—Suppose one vessel was shifting from her berth a distance of a thousand feet, how far out would she go?

A. Everybody has their own idea of that, I guess.

Q. How far would you go?

Mr. BELL.—If your Honor please, that is objected to as calling for the conclusion of the witness, immaterial.

(Testimony of H. B. Hampton.)

The COURT.—Sustained.

Mr. EVANS.—Q. What have you seen on the waterfront? Have you seen vessels backing out, going out 500 feet and then coming down?

A. I have seen a great deal of the stern-wheelers in particular, they back out pretty nice and they handle pretty well, back up, and as a rule they back out pretty well. [44]

Q. How far would you say?

A. Five hundred feet or more.

Q. Five hundred feet to go over here, a distance of a thousand feet?

A. Yes, that is the best way to handle a boat.

Redirect Examination.

Mr. BELL.—Q. How far above the deck, when you are standing in your pilot-house, are your eyes from the main-deck?

A. About 12 feet, I should think.

Q. Anything forward of the pilot-house between you and the bow to obstruct your vision?

A. Nothing there.

Q. The men that were on board the boat that morning were not members of the crew of the boat?

A. They are not steady men, they are just men that work there when there is any work to be done.

Q. What are their duties?

A. Sort of stevedores?

Q. Loading and unloading cargo? A. Yes.

Q. On the boat? A. Yes.

(Testimony of H. B. Hampton.)

Q. You were in sole charge of the navigation of the boat, were you? A. Yes.

Q. And you worked the engines from the pilot-house A. Yes.

Q. You were in charge of that also? A. Yes.

Recross-examination.

Mr. EVANS.—Those men were employed on board the boat that morning, were they not?

A. Yes.

Q. That pier was covered with a shed?

A. Yes.

Q. How high is that shed?

A. I could not tell you.

Q. It is impossible for you to see around it as you go by? A. Certainly.

The COURT.—That is to say there were buildings on the end of the pier?

A. Yes.

Q. So high that neither ship could see over it?

A. No.

Q. That is the ordinary lookout? A. No.

TESTIMONY OF W. H. LARKIN, FOR LIBELANT.

W. H. LARKIN, called for the libelant, sworn. [45]

Mr. BELL.—Q. Mr. Larkin, what is your occupation?

A. Well, I am working on shore now.

Q. Were you on board the "Four Sisters" when

(Testimony of W. H. Larkin.)

the collision occurred between her and the "Pyramid"? A. Yes.

Q. Where were you actually prior to the time of the collision? A. I was down in the cabin.

Q. Where were you when the "Four Sisters" left the dock?

A. When she left I took in the after line and I went directly down into the cabin there. I had the morning paper and I went down there and looked over it:

Q. Did you come on deck before the collision?

A. No.

Q. When did you first come on deck?

A. Well, when he commenced backing up I commenced to get on deck; I thought there was something wrong.

Q. What, if anything, happened.

A. Just when I got on deck she struck, and it knocked me off my balance.

Q. Did you have anything to do with the navigation of the vessel? A. No.

Q. Anything to do with the working of the engines? A. No.

Q. You were on there in the capacity, then, of loading and unloading cargo?

A. Yes, that is all.

Cross-examination.

Mr. EVANS.—Q. When you came on deck, Mr. Larkin, where was the steamer "Pyramid"?

A. When I got on deck they just came together.

(Testimony of W. H. Larkin.)

Q. You did not see anything that went before?

A. No. I went right down below and I was there until he commenced to back up, when I commenced to get up on deck, and just as I got up on deck they came together.

Q. In what condition was the whistle on the boat at that time?

A. I was sitting down alongside of the engine; I could not say as to the whistle. [46]

Q. Did you hear the boat whistle?

A. I could not because there is so much noise down there, with the engine, I could not hear the whistle.

Q. You could not hear the whistle when you were down below? A. No.

Q. The whistle is really with reference to the engine-room right above it?

A. It is right above the top of the pilot-house.

The COURT.—Is that right up over the engine?

A. Yes, right up over the engine.

Redirect Examination.

Mr. BELL.—Q. Do you know whether you heard the whistle or whether you did not hear the whistle?

A. No, I could not say that I heard it, because I did not hear it; I know I did not hear it.

Q. You were reading the paper?

A. I was looking over the paper and my mind was not on the whistle.

TESTIMONY OF A. DAVIS, FOR LIBELANT.

A. DAVIS, called for the libelant, sworn.

Mr. BELL.—Q. Do you remember the morning that the "Pyramid" and the "Four Sisters" came into collision?

A. I do.

Q. Where were you on that morning before the collision? A. On pier 23.

Q. What were you doing there?

A. Giving instructions to the riggers to put stays on the "Henrietta."

Q. Did you see the "Four Sisters" leave the wharf?

A. Well, I seen her after she got away from the wharf.

Q. Where was she at that time?

A. She was a little beyond the center of the pier line going out.

Q. You were where on the wharf?

A. Standing at the stern of the "Henrietta."

Q. At the stern of the "Henrietta"? A. Yes.

A. What speed did the "Four Sisters" proceed out at?

A. I [47] should judge 3 or 4 miles an hour.

Q. Did you or did you not hear any whistle from the "Four Sisters" as she proceeded out?

A. I did.

Q. About where was she when she blew that whistle?

A. She was farther out than halfway.

(Testimony of A. Davis.)

Q. A little farther out than halfway?

A. Yes.

Q. Will you tell the Court what you saw, if anything, of the collision?

A. I don't remember much about it.

Q. What did you next see after the whistle of the "Four Sisters" blew?

A. Well, about the next thing that I know about is I heard the crash and whistling, and about the same time the "Pyramid" was carrying the "Four Sisters" along on her bow.

Q. You did not pay any attention after you heard the whistle of the "Four Sisters" before that crash? A. No.

Q. That attracted your attention again?

A. Yes.

Q. What did the "Pyramid" do as far as you know after that crash, did you observe?

A. Well, the next that I seen of the "Pyramid" she was on the south side of pier 25.

Q. How far off the end of the pier 21 would you say the collision occurred, where the vessels were when you saw them? A. Less than 50 feet.

Q. Do you know whether or not the "Pyramid" was backing at that time? A. No.

Cross-examination.

Mr. EVANS.—Q. When you first saw the "Four Sisters" you say she was beyond the center of the pier line; what do you mean by that?

A. Well, a little farther than halfway out, about somewhere in that neighborhood.

(Testimony of A. Davis.)

Q. Halfway out? A. Yes.

Q. Where was she with reference to pier 21?

A. She was between 21 and 23.

Q. Closer to which pier? Please point out to the Court just exactly where you first saw the "Four Sisters"; this is 21 and [48] this is 23.

A. I should judge about in here.

Q. About in here? A. Yes.

Q. About how far away from 21?

A. I don't know exactly.

Q. You were back here on the "Henrietta"?

A. I was about in here on the Henrietta."

Q. Was the "Henrietta" headed in or out?

A. Headed in.

Q. The stern was out here? A. Yes.

Q. Were you on the boat or on the dock?

A. On the dock.

Q. Talking to a rigger? A. Yes.

Q. Paying no particular attention to what went on at that time? A. No.

Q. This is about how far from the place where the collision occurred, where you were standing?

The COURT.—From where?

Mr. EVANS.—From the point of the collision. This distance here is 790 feet.

The COURT.—It will show for itself.

Mr. EVANS.—About 700 feet.

Q. Would you say that the whistle or the crash first attracted your attention?

A. It was about the same time.

Q. About the same time?

(Testimony of A. Davis.)

A. I don't remember which was first; in fact, it was very close together.

Q. You did not see the boats before they came together?

A. No; I saw this boat going out.

Q. You saw this boat?

A. I saw this boat going out.

Q. Have you any idea of the direction these boats took the minute they came together? Could you tell from where you were whether they were going across the pierhead line or swinging out this way?

A. Only when I seen them, that is all I know, when they were in collision. [49]

Q. You could not tell which particular direction they were taking at that time? A. Yes.

Q. How were they going?

A. The "Pyramid" was coming up this way and the "Four Sisters" was lying across her bow, like this.

Q. Now, they struck; which direction did they go? A. When they struck?

Q. Yes. Did they continue along in this way or did the "Four Sisters" come across the bow of the "Pyramid," did the "Pyramid" push her this way, or what happened?

A. I do not exactly know, but the "Pyramid," I don't think she changed her course at all. The next thing I saw, I was attracted by something, I don't know whether it was by a rigger, or what it was, but the "Four Sisters" was going on across

(Testimony of A. Davis.)

the bay and after I got through I went around across the pier and the "Pyramid" was coming in to 25.

Q. What sort of whistle did the "Four Sisters" have? A. An air whistle.

Q. How was it with reference to quality, was it a loud, piercing whistle, or was there an escape of air when they blew the whistle, or what?

A. It is an air whistle.

Q. It was a gas boat whistle? A. Yes.

Redirect Examination.

Mr. BELL.—Q. Are you in the employ, or have you ever been in the employ of the Larkin Transportation Company or Mr. D. L. Larkin?

A. No.

Mr. BELL.—I believe that is all.

The COURT.—Proceed.

TESTIMONY OF A. D. THOMPSON, FOR RESPONDENT.

A. D. THOMPSON, called for the respondent, sworn.

Mr. EVANS.—Q. Your occupation is that of master mariner, Captain, is it not?

A. Yes. [50]

Q. What papers do you hold?

A. Master, mate and pilot.

Q. San Francisco Bay and tributaries?

A. Yes.

Q. How long have you been on the "Pyramid"?

(Testimony of A. D. Thompson.)

A. I have been on the "Pyramid" about 10 years, very near.

Q. In what capacity? A. As master.

Q. You were master on the morning of the collision on October 2, 1926, were you not? A. Yes.

Q. Describe to the Court the maneuvers of your vessel prior to the time of the collision. Where were you lying? A. I was lying at pier 17.

Q. Where were you going?

A. We were going over to pier 25.

Q. What did you do?

A. We backed out from pier 17, we blew one blast of the whistle, one long blast, backed 150 feet from the end of pier 17 and then went ahead, and then I had to back again, because she did not answer the helm, and I went ahead again, and I still had to back again*st* before I was up to pier 21, and I blew one blast before I got to pier 21, and then I backed again and swung off about 10 feet from the dock, and I went ahead, and when I came around the corner of pier 21 the "Four Sisters" appeared coming out, but I did not hear any whistle.

Q. Then what happened?

A. Well, I reversed full speed astern and blew four blasts.

Q. What movement did you see on board of the "Four Sisters," if any?

A. I saw a couple of men running around there.

Q. Where was the "Four Sisters" when you first saw her?

(Testimony of A. D. Thompson.)

A. I was halfway between the north corner of pier 21, so he must have been at least 60 feet or something like that from the corner.

Q. Sixty feet from the corner inside of the slip?

A. Not exactly,—from that corner.

Q. Did you notice any change in the course or speed of the "Four Sisters" after you saw her?

A. No. [51]

Q. You did not? A. No.

Q. How did your vessel head, at what angle, about?

A. Well, parallel with the dock, very near.

Q. At what speed were you going then?

A. We were going under a slow bell; the boat is not very fast anyway.

Q. Give us an approximation of the speed, Captain? A. About, it might be 3½ or 4 miles.

Q. An hour? A. Yes.

Q. Was there anybody on the bow of your vessel? A. Yes, I had 2 men there.

Q. Did your vessel have any headway upon her at the moment of the collision?

A. We had some, not very much, because if I had had I would have sunk him.

Q. After the collision what happened?

A. I backed away and swung in toward the dock.

Q. Did you ever hear the whistle of the "Four Sisters"? A. No.

Q. On that morning? A. No.

Q. Did you hear it on any subsequent occasion?

(Testimony of A. D. Thompson.)

A. Yes, I heard it, but you want to be very close to it when you hear it or you never hear it.

Q. When did you hear it?

A. I heard it a few times later.

Mr. BELL.—If your Honor please, that is objected to, as to anything subsequent to the collision.

The COURT.—I suppose it would be a reasonable presumption that the condition of the whistle would be the same from constant inspection.

Mr. EVANS.—Q. Did you hear that whistle at or near the time of the collision, and the same day or near thereto?

A. I heard it the same day when I passed him going over to Oakland, when I went over to the shipyard. [52]

Q. When was that?

A. That was the same day, in the afternoon.

Q. Under what circumstances did you hear the whistle, how far away?

A. I blew a passing whistle for him and he answered it.

Q. How far away from your boat was he?

A. I could not say; it must be a quarter of a mile. I don't know if he was that far.

Q. Describe the whistle.

A. Well, it has a very poor sound.

Q. Is it loud?

Q. If he blew that up at the bulkhead you would not hear it. Just before I saw him he should have blown his whistle.

(Testimony of A. D. Thompson.)

Q. You have been a master navigating in San Francisco Bay for how long?

A. About 44 years.

Q. What is the custom with reference to changing the dock of a vessel over a short distance? How far out do the vessels go?

Mr. BELL.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—The Court will hear it over the objection. If not competent, it will be ignored in making up the decision.

A. The vessels do not go out very far. They generally keep clear of the dock.

Cross-examination.

Mr. BELL.—Q. Which dock were you lying at before you started out that morning?

A. Pier 17.

Q. Which side, the north or south side?

A. North side.

Q. As you started out, did you give a blast of your whistle? A. Yes.

Q. You backed out, did you? A. Yes.

Q. How far did you go beyond the pierhead line of pier 21, do you know?

A. Well, I figure about 60 feet.

Q. About 60 feet? A. Yes. [53]

Q. Is pier 17 as long as pier 21?

A. Yes, it is about the same.

Q. It is the same length, is it? A. Yes.

Q. Pier 19 is considerably shorter, is it?

A. Nineteen is shorter.

(Testimony of A. D. Thompson.)

Q. You were about 60 feet off of pier 17—

A. I was about 150 feet.

Q. One hundred and fifty feet off of pier 17?

A. Yes, when I backed out and swung around.

Q. When you backed out which way did you swing your bow, to port or to starboard?

A. I swung my bow to starboard in swinging out.

Q. So that you swung this way? A. Yes.

Q. And the tide was flood, was it not, against your bow?

A. There was very little tide of any kind.

Q. Are you sure of that, Captain?

A. Yes, very little.

Q. Do you know what the tide stage was that morning?

A. There is never much tide in close to the docks; about an hour and a half before high water.

Q. About an hour and a half before high water?

A. Yes.

Q. Then, as you started up, Captain, you were slanting in a little in this direction on account of the tide?

A. After I got up a little further to pier 21.

Q. You were coming in? A. Yes.

Q. How far do you think you were off pier 21 when you got to that?

A. About 60 feet, I guess.

Q. So you were coming in at a slant like that?

A. Yes.

Q. You were coming in by this corner, coming between 23 and 25? A. Yes.

(Testimony of A. D. Thompson.)

Q. You said, as I understood you, Captain, that you blew a second whistle some time? A. Yes.

Q. Where were you when you blew that whistle?

A. I was just about abreast of 19. [54]

Q. About off 19? A. Yes.

Q. What did that whistle indicate?

A. That indicated the landing whistle.

Q. In other words, that indicated you were going into 19?

A. Not alone that, but where you are passing a wharf, when you cannot see anything at all you blow your whistle.

Q. Is that a whistle that you blew in pursuance with one of the rules? A. Yes.

Q. What rule?

A. That is the rules of the road, you must blow a landing whistle.

Q. That is, you blow a landing whistle when you enter into a dock? A. Yes.

Q. Did you change your course after you saw the "Four Sisters" and before the collision at any time, Captain?

A. When I saw the "Four Sisters" I reversed to full speed astern and ported my helm.

Q. She did not obey her helm, did she?

A. Of course she did. After she backed she throws the water against the rudder and that makes her bow swing to port.

Q. But that was not until after the collision?

A. Yes, I was backing before I hit him.

(Testimony of A. D. Thompson.)

Q. How long before the collision were you backing?

A. Well, I could not say; it might be a few seconds or so, I could not say.

Q. You blew four blasts, did you? A. Yes.

Q. Just before the collision? A. Yes.

Q. How many men did you have on your boat?

A. We had ten men all told.

Q. Where were you at the time of the collision?

A. In the pilot-house.

Q. You were directing the course of the vessel, were you? A. Yes. [55]

TESTIMONY OF O. F. ADAMS, FOR RESPONDENT.

O. F. ADAMS, called for the respondent, sworn.

Mr. EVANS.—Q. Your occupation is what?

A. Marine engineer.

Q. How long have you been a marine engineer?

A. Well, I have got my fifth issue of chief's license.

Q. How long would that be?

A. Over 20 years.

Q. How long have you been with the "Pyramid?"

A. I have been with it now since a year ago last December.

Q. You were on the "Pyramid" on the morning of the collision? A. Yes.

Q. What time did you leave pier 17?

A. We left at 7:55.

(Testimony of O. F. Adams.)

Q. Will you describe as near as you can remember them the bells that you received from the pilot-house and the movements of your engine, the speed you were going at up to the time of the collision.

A. We backed out in the usual way. I have forgotten the bells. You get two bells to back up.

Q. Then after you backed up what did you do?

A. When she gets directed to where she is going you go ahead; I believe she backed up again, and then when he got very close to 21 I believe he backed up.

Q. Then what did he do?

A. Then went ahead.

Q. Have you any idea of the speed at which your vessel was going at the time of the collision?

A. I should judge about 3 miles an hour.

Q. What first called your attention to the impending danger?

A. He gave me three quick bells to back up.

Q. Then what happened?

A. Then he blew four rapid blasts of the whistle; I knew there was danger then because that was the danger whistle.

Q. At what time was the collision?

A. 8:10—8:05; it is in the log. [56]

Q. You have referred to the log-book before it came to court? A. Yes.

Cross-examination.

Mr. BELL.—Q. Where is the whistle on the "Pyramid" located?

(Testimony of O. F. Adams.)

A. It is right forward of the smokestack.

Q. Could you blow the whistle from the pilot-house? A. Oh, yes.

Q. You were below during all the time?

A. Yes, I was in the engine-room.

TESTIMONY OF C. ENGSTROM, FOR RESPONDENT.

C. ENGSTROM, called for the respondent, sworn.

Mr. EVANS.—Q. You were deck-hand on the "Pyramid" at the time of the collision, were you?

A. Yes.

Q. Where were you standing?

A. On top of the poop forward.

Q. When did you go up there?

A. I went up there after we left 17.

Q. When you left 17? A. Yes.

Q. Was anybody with you?

A. Yes, another fellow; there were two of us.

Q. How did you face as you went out?

A. I faced ahead.

Q. What were you doing up there in the bow?

A. I was on top of the bow to take a line.

Q. You came up on top of the bow when? Who was to take a line?

A. I was to take a line to the dock when we got there.

Q. Who asked you to go there?

A. Nobody; I always go there.

Q. You always go there? A. Yes.

Q. As a matter of duty? A. Yes.

(Testimony of C. Engstrom.)

Q. Tell us what happened from the time you left 17 until the time of the collision.

A. We backed out from 17 and came ahead, and then he backed up a couple of times more and went ahead toward 25, and when we got to 21 the "Four Sisters" was coming out, and he blew four short whistles and backed up full speed, and then they came together. [57]

Q. Where was the "Four Sisters" when you first saw her? A. Well, about the end of 23.

Q. About the end of 23? A. Yes.

Q. You mean inside of the slip? A. Yes.

Q. You came along 21 here? A. Yes.

Q. Where was your boat when you first saw the "Four Sisters"?

A. The first I saw of the boat was about even with the north end corner of 21.

Q. Where was the "Four Sisters"?

A. The "Four Sisters" was about down here.

Q. Right in there? A. Yes.

Q. At what speed do you think you were going at the time of the accident, or when you saw the "Four Sisters"?

A. The first time that I seen her?

A. Yes. A. Three miles an hour.

Q. What happened when you saw the "Four Sisters"?

A. He blew 4 whistles, the Captain blew 4 whistles and backed her.

Q. At what angle did the boats hit?

A. About that way, right on the amidships?

(Testimony of C. Engstrom.)

Q. Then what happened?

A. Well, there were two men came down from the pilot-house and one man came from the forecastle.

Q. Where did the "Four Sisters" go after the collision, just after you were hit?

A. She stopped right there when we backed away from her.

Cross-examination.

Mr. BELL.—Q. Did the whistle of the "Pyramid" blow before she backed or after the time she backed?

A. It blew before.

Q. Before she began to back? A. Yes.

Q. Who was the lookout on the stern of the "Pyramid" when you were backing up?

A. I don't know; I was on top of the bow, I could not tell you. [58]

Q. The boats came together at what angle? This is the "Four Sisters" and this is the "Pyramid."

A. The "Four Sisters" was coming from this direction and here is the "Pyramid" coming. The "Pyramid" was coming like this and the "Four Sisters" like this.

Q. Was the "Four Sisters" coming this way or was it coming that way?

A. It was like this.

Q. That is at the time you struck? A. Yes.

Mr. EVANS.—I have one other man who was standing on the bow at the time of the collision.

(Testimony of H. B. Hampton.)

His testimony would be cumulative and unless Mr. Bell wants to cross-examine him I won't call him.

Mr. BELL.—No.

Mr. EVANS.—That is our case.

TESTIMONY OF H. B. HAMPTON, FOR LIBELANT (RECALLED IN REBUTTAL).

H. B. HAMPTON, recalled in rebuttal.

Mr. BELL.—Q. Captain, will you indicate to the Court the angle at which the two vessels came together?

A. Probably like that.

Q. The pencil indicates which vessel?

A. The "Four Sisters."

Q. And the pen indicates the "Pyramid"?

A. Yes, the "Pyramid." When we struck she kind of knocked me over the way a little bit.

Q. Had your course changed after you saw the "Pyramid" and before the collision? A. Yes.

Q. Which direction had it changed in?

A. Changed to port. My vessel was coming out like that and I swung over that way.

Q. Why did you take that swing?

A. So as to hit a glancing blow and so that there would not be any damage to amount to anything. That was my idea.

Mr. BELL.—That is all.

Mr. EVANS.—That is all. [59]

[Endorsed]: Filed May 24, 1927. [60]

[Title of Court and Cause.]

OPINION.

The negligence and fault of the "Pyramid" is clear. After near 15 minutes "hovering" off the ends of piers 17, 19, she proceeded across the pier-head line of 21 and parallel with it, at a distance of less than 50 feet, testified Davis, contrary to the harbor regulation. Aside from that, to thus proceed masked by covered piers was a negligent trap for vessels proceeding with due care out of the slip. Then too, in the circumstances her two widely separated slip signals, were negligence. They indicated entry or departure from slips and not at all a dangerous maneuver across the pier-head line. The latter might have been indicated by a rapid series of whistles. As for the libelant's "Four Sisters," she headed out of pier 23 with reliance upon the regulation and general law of due care by others. Her signal and lookout were for vessels to be expected and plainly visible entering the slip from ahead or forward. She had no reason to expect the "Pyramid" would forge out at a right angle from behind the end of pier 21. In these circumstances the speed of the "Four Sisters" and her only lookout her one-man operator in the pilot-house 40 feet aft the bow, are not negligence contributing to the collision.

Decree for libelant.

April 14, 1927.

BOURQUIN, J.

[Endorsed]: Filed Apr. 14, 1927. [61]

In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,191.

D. L. LARKIN,

Libelant,

vs.

The American Steamship "PYRAMID," Her Engines, etc.,

Respondent;

LESLIE-CALIFORNIA SALT COMPANY, a Corporation,

Claimant and Cross-Libelant;

The American Gas Boat "FOUR SISTERS," Her Engines, etc.,

Cross-Respondent.

INTERLOCUTORY DECREE.

This cause having been heard on the pleadings and proofs adduced by the respective parties and having been argued and submitted, and due deliberation having been had, it is

ORDERED, ADJUDGED AND DECREED that libelant, D. L. Larkin, recover of and from the respondent, the damages sustained by reason of the matters alleged in the libel, together with interest and costs; and it is further

ORDERED that said cause be referred to Francis Krull, Esq., Commissioner, to ascertain and com-

pute the amount due to libelant in the premises, and to report the same to this Court will all convenient speed; and it is further [62]

ORDERED, ADJUDGED AND DECREED that the cross-libel of Leslie-California Salt Company be dismissed with costs to libelant.

Dated: San Francisco, July 5, 1927.

BOURQUIN,
United States District Judge.

Approved as to form:

HAROLD SAWYER,
ALFRED T. CLUFF,
Proctors for Respondent and Cross-libelant.

[Endorsed]: Filed Jul. 7, 1927.

Entered in Vol. 22 Judg. & Decrees, at page 1. [63]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to D. L. Larkin, the Libelant Above Named, and to Messrs. Bell & Simmons, Proctors for the Said Libelant:

Each of you will please take notice, and each of you is hereby notified that Leslie-California Salt Company, a corporation, claimant and cross-libelant above named, hereby appeals from the interlocutory decree made and entered herein on the 7th day of July, 1927, to the next United States Circuit Court of Appeals for the Ninth Circuit to be

holden in and for the said Circuit at the City and County of San Francisco, State of California.

Dated at San Francisco, this 13th day of July, 1927.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Claimant and Cross-libelant.
DANIEL W. EVANS,
Of Counsel. [64]

Copy of the within is hereby admitted on this 13th day of July, 1927.

BELL & SIMMONS,
Attorneys for Larkin Transp. Co.

[Endorsed]: Filed Jul. 14, 1927. [65]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Leslie-California Salt Company a corporation, claimant and cross-libellant herein, asserts that in the record and proceedings in the above-entitled cause and in the interlocutory decree entered herein, and in the opinion of the Court, there is manifest error in the following particulars:

First: The Court erred in holding that under the circumstances then existing the respondent steamer "Pyramid" owned by the claimant and cross-libellant herein, violated a regulation of the State Board of Harbor Commissioners for the port of San Francisco in passing closer to the pier-

heads than the distance designated in said regulation.

Second: The Court erred in holding that under the circumstances then existing, the said steamer "Pyramid" was negligent in passing near the pierheads. [66]

Third: The Court erred in holding that the said steamer "Pyramid" was at fault with respect to the whistle signals that she gave.

Fourth: The Court erred in holding that the signal given by the gas boat "Four Sisters," owned by the libellant herein, was proper.

Fifth: The Court erred in holding that the speed of the said gas boat "Four Sisters" did not contribute to the collision.

Sixth: The Court erred in holding that the failure of said gas boat "Four Sisters" to maintain a lookout other than the man at the wheel was not negligence contributing to the collision.

Seventh: The Court erred in failing to hold that the collision was due to the fault of the said gas boat "Four Sisters."

Eighth: The Court erred in dismissing the cross-libel herein.

Ninth: The Court erred in making and entering its interlocutory decree herein in favor of the libellant, and in failing to enter an interlocutory decree herein in favor of the claimant and cross-libellant.

Dated: San Francisco, California, this 13th day of July, 1927.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Claimant and Cross-libellant.
DANIEL W. EVANS,
Of Counsel.

[Endorsed]: Filed Jul. 14, 1927.

Copy of the within is hereby admitted on this 13th day of July, 1927.

BELL & SIMMONS,
Attorneys for Larkin Transp. Co. [67]

[Title of Court and Cause.]

STIPULATION AND ORDER RESPECTING EXHIBITS ON APPEAL AND BONDS ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto:

1. That all of the exhibits introduced in evidence herein may be sent up in connection with the appeal prosecuted herein as original exhibits instead of being copied in the apostles on appeal.

2. That the chart of the San Francisco waterfront and the photostatic enlargement of that section of said chart which shows the section of the waterfront lying between piers 17 and 25, both of which documents were used at the trial herein and

which are now in the possession of the proctors for the claimant and cross-libellant, may be considered as admitted in evidence and may be sent up as original exhibits in the case. [68]

3. That upon the filing by claimant and cross-libellant of a bond for costs in the sum of $250.00 with an approved surety thereon, as required by Section 1 of Rule II of the Rules in Admiralty, United States Circuit Court of Appeals for the Ninth Circuit, execution may be stayed upon the interlocutory decree herein pending the determination of the appeal and no further bond, supersedeas or otherwise, shall be required, but the bonds filed in the District Court shall remain in full force and effect.

Dated: San Francisco, California, this 13th day of July, 1927.

BELL & SIMMONS,
Proctors for Libellant.
HAROLD M. SAWYER,
ALFRED T. CLUFF,
Proctors for Claimant and Cross-libellant.
DANIEL W. EVANS
Of Counsel for Claimant and Cross-libellant.

So ordered this 14th day of July, 1927.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jul. 14, 1927. [68½]

[Title of Court and Cause.]

BOND FOR COSTS ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, United States Fidelity and Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and doing business in the City and County of San Francisco, State of California, is held and firmly bound unto D. L. Larkin in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said D. L. Larkin, his successors and assigns, for the payment of which well and truly to be made, the undersigned binds itself, its successors and assigns firmly by these presents.

Sealed with the undersigned's corporate seal and dated this 13th day of July, 1927. [69]

The condition of this obligation is:

WHEREAS, Leslie-California Salt Company, a corporation, as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an interlocutory decree of the District Court of the United States for the Northern District of California, bearing date the 5th day of July, 1927, in a suit in admiralty wherein D. L. Larkin is libellant and the American steamship "Pyramid" is respondent, and Leslie-California Salt Company, a corporation, is claimant and cross-libellant, and the American gas boat "Four Sisters" is cross-respondent.

NOW, THEREFORE, if the above-named appellant, Leslie-California Salt Company, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By HARRY JOHNSON,

Attorney-in-fact.

State of California,
City and County of San Francisco,—ss.

On this 13th day of July, in the year one thousand nine hundred and twenty-seven, before me, Marie Forman, a notary public in and for the City and County of San Francisco, personally appeared Harry Johnson, known to me to be the persons whose names *are* subscribed to the within instrument as the attorneys-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that *they* subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and *their* own names as attorneys-in-fact.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [70]

Copy of the within is hereby admitted on this 13th day of July, 1927.

BELL & SIMMONS,
Attorneys for Larkin Transp. Co.

[Endorsed]: Filed Jul. *41*, 1927. [71]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 71 pages, numbered from 1 to 71, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of D. L. Larkin vs. The American S. S. "Pyramid," No. 19,191, as the same now remain on file of record in this office.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of twenty dollars and fifty-five cents ($20.55), and that the same has been paid to me by the proctor for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of September, A. D. 1927.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [72]

[Endorsed]: No. 5277. United States Circuit Court of Appeals for the Ninth Circuit. Leslie-California Salt Company, a Corporation, Claimant of the American Steamship "Pyramid," Her Engines, etc., Appellant, vs. D. L. Larkin, Owner of the American Gas Boat "Four Sisters," Her Engines, etc., Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed September 22, 1927.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By F. H. Schmid,

Deputy Clerk.

No. 5277

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LESLIE-CALIFORNIA SALT COMPANY (a corporation), claimant of the American Steamship "Pyramid", her engines, etc.,

Appellant,

vs.

D. L. LARKIN, owner of the American Gasboat "Four Sisters", her engines, etc.,

Appellee.

BRIEF FOR APPELLANT.

HAROLD M. SAWYER,
ALFRED T. CLUFF,
Mills Building, San Francisco,
Proctors for Appellant.

DANIEL W. EVANS,
Mills Building, San Francisco,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5277

IN THE

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For the Ninth Circuit

LESLIE-CALIFORNIA SALT COMPANY (a corporation), claimant of the American Steamship "Pyramid", her engines, etc.,

Appellant,

vs.

D. L. LARKIN, owner of the American Gasboat "Four Sisters", her engines, etc.,

Appellee.

BRIEF FOR APPELLANT.

This is an appeal from an interlocutory decree in admiralty of the District Court for the Northern District of California, Southern Division, awarding damages to the libellant in a collision case and dismissing the cross-libel.

The case involves a collision between the gasboat "Four Sisters", which was leaving her slip on the San Francisco waterfront, and the steamship "Pyramid", which was maneuvering to enter an adjacent slip. The collision occurred at about 7:45 A. M., October 2, 1926, in close proximity to the pierheads. D. L. Larkin, the owner of the "Four Sisters" filed a libel against the "Pyramid", which was claimed by

her owner, Leslie-California Salt Company, who answered and in turn filed a cross-libel against the "Four Sisters". Larkin claimed the "Four Sisters" and answered the cross-libel. This appeal is prosecuted by the Salt Company from the interlocutory decree, which held the "Pyramid" solely at fault for the collision.

STATEMENT OF FACTS.

There is almost no conflict in the material parts of the testimony. Neither vessel was aware of the proximity of the other until a few seconds before the impact. From that moment on there is the usual conflict as to the movements of the two vessels, but this evidence is not referred to in the opinion of the court below. The learned trial judge based his decision solely upon the undisputed testimony concerning the performance of the two vessels prior to the moment of discovery. We also believe that this part of the evidence is determinative of the fault or lack of fault on the part of each vessel.

The "Pyramid" is a stern wheeler about 161 feet long. The Salt Company, her owner and appellant herein, employs her to collect and deliver cargoes of salt in and around San Francisco Bay and its tributaries. She was under command of Captain A. D. Thompson, an experienced mariner who had acted as her master for about ten years. (Apos. 58.)

On the morning of October 2nd, shortly before eight o'clock, the "Pyramid" left her mooring at pier 17 and backed from the slip, intending to proceed to

pier 25 to deliver a cargo of salt. As she headed out of pier 17, she blew one long blast on her whistle. She continued backing until she had reached a point about 150 feet from the end of pier 17, at which point she went ahead. She was compelled to back once more before she came abreast of pier 21 because she did not answer her helm. Before she came abreast of pier 21, she sounded another blast of her whistle. Her distance from the pier and as she started to pass it was, according to the captain, about 60 feet. She was proceeding under slow bell at about three and a half to four miles an hour. There were two men on her forecastle head. (Apos. 58, 59.)

As the "Pyramid" started to pass pier 21, the master at the wheel and the two men on the bow suddenly saw the gasboat "Four Sisters" about 60 feet away as she came out of the slip and headed across their bow. The master of the "Pyramid" thereupon reversed full speed astern and blew a four blast danger signal and ported his helm. A few seconds later the collision occurred. (Apos. 58, 59.)

The story of the "Four Sisters" is substantially as follows: She is a gasboat 58.5 feet long, of the common gasboat freighter single-ender type, the engines and pilot house being about 40 feet aft of the stem. (Apos. 46.) A certificate of inspection was introduced in evidence on behalf of Larkin, her owner and appellee herein, to show that she was licensed to operate with one operator. (Apos. 40.) On the morning of the collision, however, there were four men on board in the employ of the vessel. Her master, H. B. Hampton, was at the wheel while two men were down

below and one man was standing on the after deck. No one was on lookout. (Apos. 46.)

Prior to the collision, her berth on that morning had been on the south side of pier 23, well up by the bulkhead. (Apos. 44.) When she left she pulled out around the steamer "Henrietta", which was lying just ahead of her, and started out the slip at half speed, five miles an hour, on a course parallel to pier 21 and about 30 feet away from it. When she was about half way out of the slip, she blew one blast on her whistle (Apos. 42), which was an air whistle such as is commonly used on boats of that type. (Apos. 45, 46.)

THE ISSUES.

The learned trial court held that the "Pyramid" was solely at fault for the collision because, first, she was proceeding across the pierhead line of Pier 21 and parallel with it at a distance of less than 500 feet, contrary to the Harbor regulation of the State Board of Harbor Commissioners of the City and County of San Francisco, because, second, regardless of the regulation, her maneuver "to thus proceed masked by covered piers, was a negligent trap for vessels proceeding with due care out of the slip", and third, because her two widely separated slip signals were negligence. The court completely disregarded the excessive speed of the "Four Sisters" while proceeding out of the slip, which was admitted to be five miles per hour, or half speed, (Apos. 45), and the fact that her only lookout was her one man

operator in the pilot house, forty feet aft of the bow. (Apos. 70.)

It is the contention of this brief that not only was the "Four Sisters" negligent in the above respects, but also that this negligence was the sole and proximate cause of the resulting collision.

THE ASSIGNMENTS OF ERROR.

The memorandum opinion of the learned trial court, (Apos. 70), contains the only findings of fact in the case. The assignments of error are all predicated upon this opinion and the facts found therein in themselves sufficiently indicate the issues presented by this appeal.

The assignments of error are as follows:

First: The court erred in holding that under the circumstances then existing the respondent steamer "Pyramid" owned by the claimant and cross-libellant herein, violated a regulation of the State Board of Harbor Commissioners for the port of San Francisco in passing closer to the pierheads than the distance designated in said regulation.

Second: The court erred in holding that under the circumstances then existing, the said steamer "Pyramid" was negligent in passing near the pierheads.

Third: The court erred in holding that the said steamer "Pyramid" was at fault with respect to the whistle signals that she gave.

Fourth: The court erred in holding that the signal given by the gasboat "Four Sisters", owned by the libellant herein, was proper.

Fifth: The court erred in holding that the speed of the said gasboat "Four Sisters" did not contribute to the collision.

Sixth: The court erred in holding that the failure of said gasboat "Four Sisters" to maintain a lookout other than the man at the wheel was not negligence contributing to the collision.

Seventh: The court erred in failing to hold that the collision was due to the fault of the said gasboat "Four Sisters".

Eighth: The court erred in dismissing the cross-libel herein.

Ninth: The court erred in making and entering its interlocutory decree herein in favor of the libellant, and in failing to enter an interlocutory decree herein in favor of the claimant and cross-libellant.

These assignments may be grouped and will be discussed under the following propositions:

1. Under the circumstances of this case, the conduct, operation and navigation of the "Pyramid" was free from any fault, (first, second, third and ninth assignments) because—

(a) In proceeding on a course closer to the pierheads than 500 feet therefrom, as provided by the regulation of the State Board of Harbor Commissioners, the "Pyramid" did not violate that regulation under proper construction thereof. (First assignment.)

(b) The "Pyramid" was not negligent under the circumstances then existing in passing near the pierheads. (Second assignment.)

(c) The whistle signals given by the "Pyramid" were lawful and proper under the law and in accordance with prudent navigation. (Third assignment.)

2. The conduct, operation and navigation of the "Four Sisters" was negligent and the sole and proxi-

mate cause of the resulting collision, (fourth, fifth, sixth, seventh and eighth assignments) because—

(a) The whistle signal given by the "Four Sisters" when leaving the slip was improper and insufficient. (Fourth assignment.)

(b) The speed of the "Four Sisters" while leaving the slip was excessive and improper. (Fifth assignment.)

(c) The failure of the "Four Sisters" to maintain a lookout other than the man at the wheel was improper and a fault. (Sixth assignment.)

ARGUMENT.

I.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE CONDUCT, OPERATION AND NAVIGATION OF THE "PYRAMID" WAS FREE FROM ANY FAULT.

(a) In Proceeding on a Course Closer to the Pierheads Than 500 feet Therefrom, as Provided by the Regulation of the State Board of Harbor Commissioners, the "Pyramid" Did not Violate That Regulation Under Proper Construction Thereof.

The first charge of negligence made by the learned trial judge against the "Pyramid" is that "after near fifteen minutes of 'hovering' off the ends of piers 17 and 19, she proceeded across the pierhead line of 21 and parallel with it at a distance of less than 500 feet", contrary to the harbor regulation. (Apos. 70.)

At the very outset it should be observed that the validity of this harbor regulation is open to serious

doubt. The existence of any such regulation was denied in the answer to the libel. (Answer, par. VIII, Apos. 15.) This denial was intended to raise the issue of the validity of the adoption of the regulation, that is, whether or not the State Board of Harbor Commissioners had power to make the regulation.

The regulation in question reads as follows:

> "Vessels must not run within 500 feet from and parallel to the pierhead line." (Apos. 37.)

The authority of the State Board of Harbor Commissioners for the port of San Francisco to make rules and regulations concerning the property of the state under their control is contained, defined and limited in *Section 2524* of the *Political Code of the State of California,* in the paragraph headed "Rules and Regulations", *page 754* of the *Political Code.* This paragraph is as follows:

> "The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state which is intrusted to them by virtue of this article, and said commissioners are hereby authorized and required to make, without delay, and from time to time, and publish not less than thirty days in a daily newspaper of general circulation published in the city and county of San Francisco, all needful rules and regulations not inconsistent with the laws of the state or of the United States in relation to the mooring and anchoring of vessels in said harbor, providing and maintaining free, open and unobstructed passageways for steam ferryboats and other steamers navigating the waters of the bay of San Francisco and the fresh water tributaries of said bay so that such steamers can conveniently make their trips without impediment from vessels at anchor or other obstacles."

An examination of the alleged rule in the light of the above section of the Code would seem to indicate that there is grave doubt of the authority of the Board of Harbor Commissioners to make it because the specific authority conferred is authority to make

> "* * * all needful rules and regulations not inconsistent with the laws of the state or of the United States in relation to the mooring and anchoring of vessels in said harbor, * * *."

and the alleged rule refers to neither mooring nor anchoring but to navigation. It is submitted, therefore, that the adoption of this rule was utterly beyond the power of the Board of Harbor Commissioners and that consequently it has no validity as a local rule or regulation.

But even if it be conceded that the Board of Harbor Commissioners did have power to adopt this rule or regulation, it has no application as such to the facts of this case. A local rule of this character was, we submit, never intended to apply to a vessel which was simply changing from her berth or dock to another berth or dock a short distance away.

The piers to the north of the ferry building in San Francisco are numbered by odd numbers (Mr. Bell's opening statement, Apos. 33), and it is therefore apparent that when the "Pyramid" left Pier 17 to proceed to pier 25, she was changing her berth from pier 17 to the fourth pier north thereof, or in other words, a very short distance.

In construing any alleged local rule of navigation, the court is entitled to look to and accept the interpretation of that rule adopted by local authorities, and

where the local authorities neglect to enforce it or enforce it only under certain circumstances, the federal courts will not be more zealous in their interpretation.

The James Gray v. The John Frazer, 21 How. 184; 16 L. Ed. 106.

During the trial, James Byrne, Jr., Assistant Secretary of the Board of Harbor Commissioners, testified as follows:

"Mr. Evans. Q. Is that rule enforced with respect to vessels changing their berths a short distance away?

Mr. Bell. Objected to as calling for the conclusion of the witness.

The Court. The objection will be sustained.

Mr. Evans. If your Honor please, Mr. Byrne is an officer of the Harbor Commissioners——

The Court. I know, but you are asking if it is enforced.

Mr. Evans. He certainly should know if that rule is enforced.

Mr. Bell. It is immaterial whether it is or not.

The Court. If you can show any action by the Board which provides that this rule does not apply to vessels passing from berth to berth, that may be a different matter. The objection is sustained.

Mr. Evans. Has the Board of Harbor Commissioners ever interpreted that rule?

Mr. Bell. The same objection.

The Court. You may answer, it is preliminary.

Mr. Evans. Has the Board ever interpreted that rule in any way, shape or form as to what it does mean?

A. They have notified various vessels that run within that limit that that was their rule and asked them to observe it.

Q. Under what circumstances?

Mr. Bell. The same objection, immaterial, irrelevant and incompetent.

The COURT. Overruled; if not competent the Court will not give it any consideration.

A. Vessels that operate like the 'Harvard' and 'Yale' and those that would create a wash, and disturb the vessels that are tied to the piers.

Mr. EVANS. Q. Navigating under what circumstances—for a long distance along the pierhead line?

A. Yes.

Q. Has a complaint ever been brought to your attention regarding vessels running a shorter distance along the pierhead line?

A. Not a short distance; no." (Apos. 37-38.)

This evidence given by Mr. Byrne is undisputed and from it it appears that the only vessels that have ever been notified by the Board with respect to their observation of this rule are vessels that operate like the "Harvard" and "Yale" and those that would create a wash and disturb the vessels that are tied to piers. In short, the application of the rule has been limited to vessels navigating for a long distance along the pierhead line and the Board of Harbor Commissioners have never received a complaint nor enforced the rule with regard to vessels running a shorter distance along the pierhead line.

The undisputed testimony therefore brings the enforcement of the regulation in this case squarely within the rule laid down by Mr. Chief Justice Taney in the case of *The James Gray v. The John Frazer, supra,* in which the learned Chief Justice used the following language:

> "Yet, upon the evidence before the court, we do not think The James Gray ought to be regarded as in fault, by remaining at anchor in the harbor beyond the time limited in the city ordi-

> nance. She was seen there by the harbormaster day after day, without being ordered to depart; nor did he seek to inflict the penalty. The object of this regulation was obviously to prevent this thoroughfare from being crowded by vessels at anchor, which would make it inconvenient or hazardous to vessels coming into the port. And from the conduct and testimony of the harbormaster, it may be fairly inferred that this regulation was not strictly enforced when the thoroughfare was not overcrowded, and that single vessels were sometimes permitted to remain beyond the time fixed by the ordinance without molestation from the city authorities. And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbormaster saw her lying there three days beyond the limited time, without even remonstrance or complaint. He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities, it ought not to be more rigidly interpreted and enforced by this court." (62 U. S. 184; 16 L. Ed. 106 at p. 108.)

We submit, therefore, that the harbor regulation in question has never been construed by the State Board of Harbor Commissioners as applicable to vessels engaged in shifting from one berth to another a short distance away. Any such construction would be utterly opposed to common sense. Under such a construction, a vessel desiring to move to an adjacent pier or one less than a thousand feet away would be obliged first to head out five hundred feet, then pursue a course parallel to the pierhead line until opposite her destination, and then head in for another distance of five hundred feet. The common sense view of the situation is well expressed by Adams, District Judge,

in the following language, which we submit is peculiarly applicable to the facts in the case at bar.

> "The Stella was unavoidably near the ends of the piers in performing her necessary movements. She could not be expected to go out into the river considering the short distance she had to traverse." (*The Transit,* 148 Fed. 138 at p. 139.)

We submit, therefore, that the navigation of the "Pyramid" in this case did not constitute a violation of the San Francisco Harbor regulation properly construed and that consequently the "Pyramid" was not negligent *per se* merely because she was navigating within less than five hundred feet of the pierheads.

(b) The "Pyramid" Was Not Negligent Under the Circumstances Then Existing in Passing Near the Pierheads.

Although the "Pyramid" was not, as we have seen, under any duty to proceed five hundred feet out into the stream before shaping her course from pier 17 to pier 25 *(The Transit, supra),* she nevertheless was under a duty, under the circumstances to navigate with extreme caution. It is well settled that where vessels meet off the end of a pier or near a slip, both should navigate with extreme caution. Under such circumstances the statutory steering and sailing rules have little application to the vessel which is coming out of a slip and before she is on her course, but the case is rather one of special circumstances and the general prudential rules should govern.

The Servia, 149 U. S. 144; 37 L. Ed. 681;
The Moran, 254 Fed. 766 (2 C. C. A.);
The Komuk and The Don Juan, 50 Fed. 618.

The test therefore is whether or not the "Pyramid" was navigated with caution under the circumstances, and that is to be determined by her conduct and not by the mere fact that she was navigating in close proximity to the pierheads.

In examining the conduct of the "Pyramid", we find that prior to the collision she was proceeding under a slow bell at a speed of approximately three and a half or four miles per hour, as Thompson, her master testified. (Apos. 59.) The "Pyramid's" engineer, Adams, testified that he would judge her speed about three miles an hour, (Apos. 65), and Engstrom, one of the lookouts on the "Pyramid", was of the same opinion. (Apos. 67.) This evidence is uncontradicted and we think it may be safely assumed that the speed of the "Pyramid" was not in excess of four miles an hour and was in all probability between three and three and a half. It also appeared that she was operating against a flood tide, though it was admitted that the tide did not amount to very much in close to the docks. (Apos. 62.) In view of these circumstances, we submit that no fault can be charged against the "Pyramid" by reason of her speed. Furthermore, it appears clearly enough that she had a proper and efficient lookout so that even the learned trial judge could not criticise her conduct on this account.

The vice of the opinion of the learned trial judge, (Apos. 70) is that he condemned the "Pyramid" largely because of her proximity to the pierheads, not only upon the ground that this proximity constituted a violation of the harbor regulation, but upon the further

ground that navigation in close proximity to the pierheads constituted "a negligent trap for vessels proceeding with due care out of the slip". It is true that the learned trial judge also charged the "Pyramid" with negligence because of her "two widely separated slip signals", which we shall shortly discuss, but we submit that no one can read his opinion without reaching the conclusion that the "Pyramid" was condemned on account of her location and not because of her conduct. This, we submit, was manifest error on the part of the learned trial judge.

(c) The Whistle Signals Given by the "Pyramid" Were Lawful and Proper Under the Law and in Accordance With Prudent Navigation.

The undisputed testimony in this case shows that when the "Pyramid" backed out of pier 17 she blew one long blast of the whistle and that she blew one blast before she reached pier 21, (Apos. 58), and while abreast of pier 19. (Apos. 54, 63.) These are the "two widely separated slip signals" characterized by the learned trial judge as negligence. (Apos. 70.) In his opinion these signals indicated entry or departure from slips and not at all a dangerous maneuver across the pierhead line, which latter he suggested might have been indicated by a rapid series of whistles.

The rules of navigation require that vessels leaving or entering a slip shall give one long blast of the whistle to warn other vessels of their intentions. This is provided for in Rule V of Article 18, of the *Inland Rules* which is as follows:

> "Rule V. Whenever a steam-vessel is nearing a short bend or curve, in the channel, where, from

the height of the banks or other cause, a steam-vessel approaching from the opposite direction cannot be seen for a distance of half a mile, such steam vessel, when she shall have arrived within half a mile of such curve, or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signal as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules." (*Comp. Stats.*, Sec. 7892; *Rule V, Act June 7, 1897,* c. 4, Sec. 1, Art. 18.)

There can be no question, therefore, that the first signal blown by the "Pyramid" when she started to back out of pier 17 was lawful, proper and in strict compliance with the rule.

Moreover, it is equally apparent that the second signal blown when the "Pyramid" was abreast of pier 19 was an appropriate and lawful signal. This is the signal to be blown at a bend, and we submit that the projecting pier which masks vessels behind it, is just as much a danger to navigation as a bend in a river. Both cases deal with a situation that arises when one vessel is hidden from the sight of the other and the

long blast of the whistle is the appropriate and lawful manner of dealing with the situation.

It will be observed that the learned trial judge not only charged the "Pyramid" with fault for blowing these lawful and proper slip signals, which he said were misleading, but also found her at fault for failing to blow "a rapid series of whistles". (Apos. 70.)

"A rapid series of whistles" can signify only one thing and that is the alarm signal provided for in Rule III of Article 18 of the *Inland Rules,* which reads as follows:

> "Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (*Comp. Stats.,* Sec. 7892, *Rule III, Act of June 7, 1897,* c. 4, Sec. 1, Art. 18.)

At the time the "Pyramid" blew one blast of the whistle when off pier 19, the "Four Sisters" was still in the slip and invisible to the "Pyramid". Consequently, Rule III of the *Inland Rules* is totally inapplicable because the "Pyramid" did not know that the "Four Sisters" was coming out of the slip and obviously could have entertained no doubts as to the course or intention of a vessel of whose existence she was not even aware.

The error into which the learned trial judge has fallen is patent. The "Pyramid" has been condemned for doing that which the law requires, and also for failing to do that which the law forbids. Sound signals are to be blown only when certain conditions

actually exist, and when those conditions do not exist, the blowing of inappropriate sound signals is a fault which has been severely condemned.

We have now examined in detail all the charges of negligence made by the learned trial judge against the "Pyramid" upon the basis of which he held the "Pyramid" solely to blame for this collision, and we submit that not one of these charges finds any support in the evidence and the law applicable thereto. The "Pyramid" was not at fault merely because she was operating in close proximity to the pierheads in view of the fact that she was shifting to a berth only four piers north. Her navigation and conduct during this maneuver were entirely free from blame. Her speed was moderate, and in fact merely sufficient to give her steerage way against the flood tide. She had two lookouts against whom no criticism has been urged. She blew appropriate and lawful signals fully adapted to the circumstances which existed, and calculated to warn any shipping in the slips of her proximity. We submit the "Pyramid" was free from fault of any kind and her owner should have had a decree against the "Four Sisters" on its cross-libel.

II.

THE CONDUCT, OPERATION AND NAVIGATION OF THE "FOUR SISTERS" WAS NEGLIGENT AND THE SOLE AND PROXIMATE CAUSE OF THE RESULTING COLLISION.

The learned trial judge not only found that the "Pyramid" was negligent in the respects hereinbefore discussed, but he also acquitted the "Four Sis-

ters'' of any fault or responsibility for the collision. In his opinion he specifically stated that ''in these circumstances the speed of the 'Four Sisters' and her only lookout, her one man operator in the pilot house, forty feet aft of the bow, are not negligence contributing to the collision''. (Apos. 70.) In our view the negligence of the ''Four Sisters'' so casually glossed over by the learned trial judge not only *did* contribute to the collision, but was its sole and efficient proximate cause.

(a) The Whistle Signal Given by the ''Four Sisters'' Was Improper and Insufficient.

We have already discussed in connection with the ''Pyramid'', the duty of vessels to blow one long blast of the whistle when leaving or entering a slip for the purpose of warning other vessels of their intentions. The rule is silent as to when this whistle should be sounded, but as it applies to vessels leaving a slip, it is held that the whistle should be sounded at the moment calculated to give the greatest and most timely warning to vessels navigating in the vicinity.

The Daniel Willard, 235 Fed. 112 (2 C. C. A.);
The Edouard Alfred, 261 Fed. 680.

Although no whistle from the ''Four Sisters'' was heard by the ''Pyramid'', nevertheless there was testimony in the record sufficient to justify a finding that the ''Four Sisters'' did in fact blow a slip whistle. Hampton, her master, so testified, (Apos. 45), and he was corroborated by a disinterested witness, Davis, (Apos. 53), who testified that the ''Four Sisters was a little more than half way out of the slip when she

blew the whistle. Hampton had previously testified that he was just about half way out at the time. (Apos. 45.)

With regard to the efficiency of this whistle, Thompson, master of the "Pyramid" testified that he did not hear the whistle and that if the whistle had been blown at the bulkhead, it could not have been heard. He also testified that the whistle "has a very poor sound" and "you want to be very close to it when you hear it or you never hear it". (Apos. 60.)

The only testimony which tends at all to contradict this testimony regarding the inefficiency of the whistle is that of Hampton, master of the "Four Sisters", who testified that the whistle was efficient, had been recently inspected, did not require any repairs, and was a regular gasboat whistle. (Apos. 45-46.) On the other hand, Larkin, the owner of the "Four Sisters" was in the cabin of the "Four Sisters" at the time the whistle was blown and did not hear it. (Apos. 52.)

While we concede that there is evidence enough to justify a finding that the "Four Sisters" did blow a slip whistle, we think it is equally clear that the whistle was blown at or about the time she was half way out of the slip and that the whistle itself was a poor and inefficient instrument.

It was at best a gasboat whistle with little sound carrying power and under the circumstances it should have been blown at that point where it was most likely to be heard by shipping outside the slip and in the vicinity of the pierheads. As Thompson, the mas-

ter of the "Pyramid", put it, "just before I saw him he should have blown his whistle". (Apos. 60.) If blown at that time there might have been a chance of its having been heard, but blown as it was about half way up the slip, there was little possibility that it could have been heard. There were four men on board the "Four Sisters", (Apos. 46), of whom only two, Hampton, the master, and Larkin, the owner, testified at the trial. Hampton testified that he blew the whistle and heard it. Larkin did not hear it, although Davis, on the dock did. If Larkin himself, being then on board the "Four Sisters" did not hear this whistle, it is not surprising that the "Pyramid" did not hear it, and the reasons it was not heard were because, first, it was blown when the "Four Sisters" was too far back in the slip, and secondly, because it was merely an apology for a whistle.

Where a signal is given by a vessel but its whistle is so feeble, imperfect or inefficient that it gives no notice of its proximity to neighboring vessels, the vessel blowing such whistle is at fault.

The Luray, 24 Fed. 751;

Act of June 7, 1897, c. 4, Sec. 1, Art. 15; *Comp. Stats.* 7888;

The Motorboat Act, Act of June 9, 1910, chap. 268, Sec. 4, *Comp. Stats.* 8280;

La Boyteaux, Rules of the Road at Sea, 1920, pages 65-66.

(b) The Speed of the "Four Sisters" While Leaving the Slip Was Excessive and Improper.

The "Four Sisters" was leaving a slip lying between piers upon which were large covered structures so that her view of any vessel coming from the direction in which the "Pyramid" came was completely obstructed. (Apos. 50.) The speed of the "Four Sisters" while leaving the slip was half speed, or about five miles per hour, which was steadily maintained. (Apos. 45.) When the "Four Sisters" first saw the "Pyramid", the distance between the two vessels was approximately seventy-five feet, and the "Pyramid" was about a hundred feet out from the wharf, which point marks the scene of the collision. (Apos. 46.)

Where a vessel is coming out from behind a covered pier so that it is impossible for her to notice other vessels which may be navigating in the vicinity of the pierheads, the uniform rule is that she must use great caution and run slow enough to enable her to come to a stop in time to avoid collision with any craft which she may discover upon reaching the end of the dock.

The S. A. Carpenter, 275 Fed. 716;
The Edouard Alfred, 261 Fed. 680;
The Daniel Willard, 235 Fed. 112, (2. C. C. A.);
The Fearless, 156 Fed. 428.

That the speed of the "Four Sisters" did not conform to this requirement is too plain for argument. The facts speak for themselves. Although there was 75 feet between the two vessels when the "Pyramid" was first seen by the "Four Sisters", yet the latter

either did not or could not stop or reverse in time to avoid the collision. At any rate she did neither and the collision resulted.

Yet the learned trial judge completely disregarded the speed of the "Four Sisters" in fixing responsibility for the collision. We submit that in so doing he committed manifest error.

(c) The Failure of the "Four Sisters" to Maintain a Lookout Other Than the Man at the Wheel Was Improper and a Fault.

The record shows that although there were four men on the "Four Sisters" and in the employ of her owner, (Apos. 46, 49), there was nevertheless no lookout. (Apos. 46.) The only person who might be said to have served in such a capacity was Hampton himself, the master and operator, who was in the wheel house forty feet aft of the bow. (Apos. 46.)

The duty of a lookout and the duty to maintain a lookout are of the highest importance. Every doubt as to the performance of this duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated unless she vindicates herself by testimony conclusive to the contrary.

The Ariadne, 13 Wall. 475, 20 L. Ed. 542 at 543;
The Marsh Cock, 27 Lloyd's List L. R. 101;
Curtis v. Kaga Maru, 1927 A. M. C. 664 at p. 670 (W. D. Wash.).

A vessel coming out of a slip must maintain an efficient lookout.

The S. A. Carpenter, 275 Fed. 761;
The Edouard Alfred, 261 Fed. 680;

The William Jamison, 241 Fed. 950 (2 C. C. A);
The Cotopaxi, 20 Fed. (2d) 569.

A lookout maintained only by the man at the wheel is insufficient. The law will not permit a divided duty in this regard.

The William Jamison, 241 Fed. 950 (2 C. C. A.);
The Albatross, 1927 A. M. C. p. 424 (Feb. 2-1927, W. D. Wash.).

The duty to provide a lookout applies to small vessels such as motorboats and gasboats, maintaining small crews, as well as to larger vessels with numerous crews.

The O'Brien Bros., 258 Fed. 614 (2 C. C. A.);
The Albatross, 1927 A. M. C. p. 424.

At the trial there was offered in evidence on behalf of the "Four Sisters" a certificate of inspection made by the United States officials. (Libellant's Exhibit 2.) This offer was made for the purpose of showing that the "Four Sisters" could be lawfully operated by one man, nevertheless, the law is perfectly clear that the duty to provide a lookout is just as mandatory upon the owner of a small gasboat such as the "Four Sisters" as it is upon a liner. In the case of *The O'Brien Bros.,* supra, a one man boat was involved, and in the case of *The Albatross,* supra, Judge Neterer went out of his way to warn small boat operators of the mandatory character of the rule.

It is not contended that small boats must necessarily carry a large crew, but only that if the entire operation of a small boat is entrusted to one man, he must

take the consequences, if by reason of his failure to maintain a lookout, a collision results.

There were three men on the "Four Sisters" besides Hampton, all in the employ of the gasboat, and it would have been an exceedingly simple matter to have posted one of them in the bow as a lookout. Certainly Hampton himself cannot pose as a lookout when, on a boat only 58 feet long, he is stationed 40 feet aft of the bow.

The failure to maintain an efficient lookout while leaving the slip is a gross and inexcusable fault on the part of the "Four Sisters" and contributed in no small degree to the collision. When the "Pyramid" was first seen there was approximately 75 feet between the two vessels, and the observer who so testified, namely, Hampton, was 40 feet aft of the bow of the "Four Sisters". There can be no doubt that had the observer been stationed on the bow instead of 40 feet aft, he would have seen the "Pyramid" very much sooner than he did. There would have been time to reverse the engine as the "Pyramid" did and there would have been no collision.

This flagrant fault of the "Four Sisters" was waived aside by the learned trial judge as having no bearing on the collision, and here again we submit his error is manifest.

To our mind the negligence of the "Four Sisters" is conclusively established by the record. It consists in the cumulative effect of a number of faults, any one of which alone should be sufficient to charge the "Four Sisters" with sole responsibility for the collision. Her whistle was inefficient, it was blown at

the wrong time, her speed was excessive, and she had no lookout. Under such circumstances collisions are well nigh inevitable when vessels are masked from each other by intervening obstructions.

CONCLUSION.

We submit that the decision of the learned trial judge is little short of a miscarriage of justice. The "Pyramid", which we think was blameless, has been charged with sole fault for a collision resulting from nothing in the world but the gross negligence and fault of the "Four Sisters". In any event, if this court should also find, as did the learned trial judge, that the "Pyramid" was negligent, we submit that the "Four Sisters" was far more negligent and therefore the "Pyramid" is at least entitled to half damages.

We respectfully urge that the interlocutory decree of the trial court should be reversed with instructions to enter an interlocutory decree in favor of the appellant, (cross-libellant below) and to make the usual reference to ascertain the amount of appellant's damages.

Dated, San Francisco,
February 20, 1928.

Respectfully submitted,

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ALFRED T. CLUFF,
Proctors for Appellant.

DANIEL W. EVANS,
Of Counsel.

No. 5277

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LESLIE-CALIFORNIA SALT COMPANY
(a corporation),

Appellant,

vs.

D. L. LARKIN,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.*

I.

THIS COURT WILL NOT DISTURB THE FINDINGS OF THE DISTRICT COURT—PARTICULARLY WHERE THE RECORD BEFORE THIS COURT IS INCOMPLETE.

It is sufficient to affirm this very simple case of fact that all of the testimony was taken in the presence of the District Judge, and that this Court, as it has frequently said, will not disturb his findings made on conflicting evidence taken before him:

Cary Davis Tug & Barge Co. v. Commercial Boiler Works, 1927 A. M. C. 1874, C. C. A. 9.

> "The findings of that court, based as they were on competent testimony, will not be disturbed on

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*Appellee's italics unless otherwise noted. Numerals refer to pages of Apostles unless otherwise noted.

Apostles, page 42, line 6: "pier 26" should be "pier 23"; line 28: "wheel" should be "way".

appeal in the absence of some plain or obvious error, and none such is here apparent."

F. J. Luckenbach, 1925 A. M. C. 1551 at 1553; 8 Fed. (2nd) 223, C. C. A. 9;
Bangor, infra; 212 Fed. 706, C. C. A. 2.

This principle is peculiarly applicable in this instance because appellant, on cross-examination of appellee's master, Hampton, (44) and disinterested witness Davis (55) exhibited to them a photostatic enlargement of a chart and had them point out thereon, *without in any way marking on the chart* the points to which reference was being made: the place where the collision took place, the positions and courses of the two colliding vessels at divers times, the position of the third vessel, "Henrietta", and Davis at pier 23, etc. (44, 45, 46, 47, 48, 55, 56). Appellant used the same method in directly examining its witness, Engstrom (67), and appellee followed it on the cross-examination of Thompson (62), and the rebuttal of Hampton (69). Likewise, the angle of collision was indicated to the District Judge by the justaposition of physical objects (47, 48, 69), of which *no diagram was preserved.*

Thus these facts were *visually demonstrated* to the observant District Judge, who fully comprehended them; but no record of the demonstrations was preserved, so that *the most important testimony in the case is not and cannot be before this Court.* Indeed, as the photostatic chart was not offered in evidence, even *it* is before this Court only by virtue of appellee's stipulation (75). "Here", "there", "that angle",

"this way", "like this", "this direction", "like that" are *entirely meaningless* in the absence of markings on the chart:

> "Sometimes they say 'here' or 'there', but there is nothing to indicate that either the 'here' or the 'there' was marked on the chart. It is always desirable that such indefinite statements should be made definite by a mark on the chart and a letter or number."
>
> *Catawissa,* 213 Fed. 14 at 16, C. C. A. 2.

What Lacombe, Circuit Judge, said in that case, in which some letters had been placed on the chart, but the chart was not before the Court, applies precisely to the case at bar:

> "Speaking solely for himself, the writer would be inclined to the opinion that the Catawissa was free from fault, *if* 'A', 'B', 'C', and 'X' were where from the rest of the testimony he *infers* they were; but he *cannot rely on his inference to reverse the findings of the District Judge, who knew just where they were.* Therefore he concurs with his associates, who are satisfied from the record as it stands that the Catawissa had sufficient space to pass, if carefully navigated, and therefore must be held in fault."
>
> *Ibid,* at 16.

It is incumbent upon any party who appeals to have seen to it that the record in the trial Court is intelligible to the Appellate Court which he requests to review the case.

II.

THE "PYRAMID" WAS PLAINLY AT FAULT IN SEVERAL RESPECTS.

A. In Shaving the Pier Ends.

The answer to the libel (17) and the cross-libel (22) both allege that when the "Pyramid" left her mooring on the north side of pier 17, "she backed out into the stream to a point *about 70 feet away from the end of pier 17,* where she backed and turned so that her bow was headed to the north". Her master's testimony sought to increase this distance to 150 feet (58, 62). In any event, she was bound for the south side of pier 25; and after she had backed to such point off pier 17, she set a course *to shave the northeast corners of piers 21 and 23* (62, 58, 59). The tide was flooding, about an hour and a half before high water (42, 43, 62), so that it was *running against the starboard* side of the "Pyramid" and carrying her continually nearer to the northeast corner of pier 21 (62, 42, 45). Therefore, not only was the *course* of the "Pyramid" from the point to which she backed from pier 17 taking her always closer to that corner of pier 21, but the *flood tide* was always setting her over toward that corner of that pier as she pursued her course. Moreover, the "Pyramid" was *not properly answering her helm* (58).

The considered allegation in the answer (17) and the cross-libel (22) that the "Pyramid" backed to a point only *about 70 feet from the end of pier 17* should be, and probably was by the trial judge who saw the witnesses, accepted against her master's subsequent estimate of 150 feet (58, 62). In any event, when she

passed the end of pier 21 she was *"less than 50 feet" from it,* as the District Court found (70). The only *disinterested* witness, Davis, said that the collision occurred "less than 50 feet" off the end of pier 21 (54). The "Four Sisters' " master said that when the bow of the "Pyramid" "bobbed around the end" of pier 21, the "Pyramid" was *"not more than 20 or 25 feet" from the end of it* (42). The testimony of the "Pyramid's" master corroborated by that of her engineer (65), indicates that she *almost struck the end of pier 21,* as he says that he *"swung off about 10 feet from the dock"* (58), although later he "figures" and "guesses" that she was about 60 feet off the end of pier 21 (59, 61, 62). The testimony, therefore, more than justifies the conservative finding of the Court that the "Pyramid" was *"less than 50 feet"* off the end of pier 21—and here it is to be noted that the Court said "less than 50 feet" (70), *and not,* as appellant's brief states "less than 500 feet" (Brief for Appellant, 7).

It is also to be noted, in reference to the statement on page 22 of appellant's brief to the effect that "the 'Pyramid' was about a hundred feet out from the wharf, which point marks the scene of the collision", *that it does not mean* about 100 feet east of the *end* of pier 21, but about that northeast of the *north side* of that pier (46, 47). In other words, when appellant asked Hampton where the collision took place, the latter *pointed to the photostatic chart* and said "About here", and when appellant then asked "Was it about 100 feet *from the wharf?"* answered *"Possibly.* The 'Pyramid' was coming *kind of in this way"* (46). But

just before the collision *neither* boat was that far from pier 21. The "Pyramid" passed within *from 10 to less than 50 feet* of the east end of pier 21, as has been shown. As the "Pyramid" bobbed around the northeast corner of pier 21, the "Four Sisters" was about *60 feet west* of the end of pier 21 (59, 46, 47, 55) and *30 feet from the north side* of that pier (45).

At that time, then, the two vessels were *about 75 feet apart* (Brief for Appellant 22), *"not more"* (46), the "Four Sisters" being only 30 feet from the north side of pier 21, and the "Pyramid" being from 10 to less than 50 feet from the east end of that pier. *The "Pyramid" was on a slanting course, cutting the northeast corner of pier 21* when she saw the "Four Sisters", and reversed and ported her own helm, with the result that *her bow swung to port* (63), *toward the other vessel* and the slip between piers 21 and 23. The "Four Sisters" was on a course about parallel with the north side of pier 21, and when she saw the "Pyramid" bob around the northeast corner of that pier, *backed and swung her bow to port* (42, 69, 48, 51), *away from the other vessel* and also away from the north side of pier 21. As there was headway on both vessels they were *"possibly"* about 100 feet from the *north side* of pier 21 before they came together. The point of collision, therefore, was *probably west of the eastern end of pier 23, and in any event less than 50 feet east of it* (54, 55).

1. So Violating a Rule of the California State Harbor Commission.

From what has been said, it is clear that the steamer "Pyramid" violated the Harbor Commission rule of

30 years' standing (36), *expressly pleaded in the libel* (9), providing that:

> "Vessels must not run within 500 feet from and parallel to the pier head line" (9, 37).

That rule, on the face of it, is a *reasonable and essential regulation,* and its observance by the "Pyramid" unquestionably would have prevented her from running down the "Four Sisters". Her violation of the rule plainly caused the collision. Even were that not clear, since she was in actual violation of the rule at the time of the collision, she was presumptively culpable and therefore under the burden, which obviously she could not sustain, of showing *not only* that her disregard of the rule was *probably not* a contributory cause of the collision, *but that it could not have been.*

Collision, 11 *Corpus Juris,* 1181.

Brief for appellant, page 8, states that the *existence* of this rule was denied in the answer to the libel, and that such denial was "intended" to raise the issue "whether or not the State Board of Harbor Commissioners *had power* to make the regulation. *But no such point was made in the District Court.* On the contrary:

> "The COURT. Is there going to be any dispute over this rule?
>
> Mr. EVANS. *No dispute over the existence of the rule"* (36).

The only contention below, as is apparent from appellant's opening statement that "it is our contention that the rule *does not apply in the present instance"* (35), was that because the "Pyramid" was bound from one dock to another, the rule was inapplicable.

A point not raised below, nor presented by the pleadings cannot be raised for the first time in this Court:

The Lydia, 1924 A. M. C. 1001; 1 Fed. (2nd) 18, C. C. A. 2.

> "One may not try a case upon one theory, and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below."
>
> *Lesser Cotton Co. v. St. Louis, etc.,* 114 Fed. 142, C. C. A. 8.

A further answer to this new suggestion of appellant would be that *the rule is obviously within the rule-making powers of the Harbor Commissioners* as defined in the very quotation from the Political Code, quoted on page 8 of appellant's brief. Moreover, there was nothing before the lower Court and there is nothing before this Court to show by virtue of what power the rule was made, and it cannot thus be *collaterally* attacked—particularly when appellant carefully refrained below from asking the *secretary of the board* a word about its adoption (37, 38).

It is too clear for argument that the rule applied to the "Pyramid" under the circumstances at bar. The argument on pages 9 to 13 of appellant's brief is palpably unsound. Mr. Byrne *did not* testify that the rule did not apply to vessels navigating for short distances along the piers, but merely said that *no complaint* had been made to the board *of violations* of the rule by vessels running a shorter distance along the pierhead line (38). The "best way to handle a boat" in going from one pier to another pier a short distance

away *is to back out "500 feet or more" and then go ahead into the new berth* (49). Reference to the chart will demonstrate that the quickest and safest way for the "Pyramid" to have reached pier 25, for which she was bound, would have been to back 500 feet or more out of pier 17 and then proceed into pier 25. No doubt, the *reason* that no complaints had been received by the board was because *other* vessels observed the rule by so navigating.

2. So Violating Inland Rule 29 Governing "Special Circumstances".

Aside from the harbor rule, it is agreed that the situation is one of "special circumstances" (Appellant's Brief 13). It is evident from what has been said, that the manner in which the "Pyramid" attempted to get from her berth at pier 17 to a berth at pier 25 was dangerous, and that she was grossly negligent, without excuse, in shaving the end of pier 21, as heretofore described, *from 10 feet to less than 50 feet therefrom.*

Judge Hoffman, as early as 1883, in this District, held that a steamer, although at a moderate rate of speed, proceeding *within 100 feet of the San Francisco pier ends* was *solely responsible* for a collision with a small steamer backing from her berth at one of them, saying:

> "If she was, as the answer alleges, between 100 and 150 feet distant from them, *then the result proves that between 100 and 150 feet was too near.*"
>
> *McFarland v. Selby Smelting Co.,* 17 Fed. 253 at 256, N. D. Cal.

Quoting from a then recent case, he said further:

> "In the recent case of The Monticello, 15 Fed. Rep. 474-476, the Court observes:
>
> 'The state statute which requires steamers to proceed in the middle of the stream, the local rules, and repeated decisions of the courts, *all unite in condemning navigation so near to the slips as dangerous and unjustifiable. The matter has been so repeatedly discussed, and the obligation of steamers to keep away from the ends of wharves and ferry-slips so forcibly stated,* that it is wholly unnecessary to repeat it here.' The Relief, 01c. 104; The Favorita, 18 Wall. 598, 601, 602; 8 Blatchf. 539, 541; 1 Ben. 30-39." *Ibid.*

It follows that for a vessel to proceed within *from 10 to 50 feet* of the pier ends, *on an oblique course,* is grossly negligent.

No further authority than the decision of Judge Hoffman, never overruled, is necessary to fix fault on the "Pyramid". But were it essential, the decision of the Circuit Court of Appeals for the Second Circuit *in reversing a case much relied upon by appellant* (Brief for Appellant 22, 23) would be conclusive. In that case the *District Court* held that both the vessel shaving the pier ends and the vessel coming out of the slip were responsible for the collision. *The Circuit Court of Appeals held that the vessel shaving the pier ends was solely at fault, saying of the ferryboat leaving the slip:*

> "We find no evidence of excessive or unusual speed; the nature of collision negatives that. The steamer was going slow enough to avoid anything at the pier, and that was not flagrantly violating the law. As for the lookout, he was in place before anything could be seen north of the line of slip,

and he saw the schooner as soon as any one could see it. The ferryboat was without fault."

S. A. Carpenter, 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

This Court is respectfully requested *to carefully read the whole* of that case, as it is uniquely in point here.

There are innumerable other decisions holding vessels solely in fault for shaving pier ends, of which the following are typical, and in point in the instant case:

R. H. Williams, 46 Fed. 414, E. D. N. Y.;
Alvena, 78 Fed. 819 at 822, S. D. N. Y., Brown, J.;
Breakwater, 155 U. S. 252; 39 L. Ed. 139;
John Arbuckle, 185 Fed. 240, C. C. A. 2;
Transfer No. 12, 189 Fed. 549, D. C. N. J.;
Transfer No. 8, 211 Fed. 965, C. C. A. 2;
Bangor, 212 Fed. 706, C. C. A. 2;
Guiding Star, 1923 A. M. C. 243, S. D. N. Y.;
Commander, 1923 A. M. C. 834, S. D. N. Y.;
Scandinavia, 1924 A. M. C. 700, S. D. N. Y.;
James J. McAllister, 1925 A. M. C. 800, E. D. N. Y.

Indeed, vessels running too close to pier ends were held in fault in the decisions cited in appellant's brief:

Cotopaxi, 20 Fed. (2nd) 568; 1927 A. M. C. 1383, C. C. A. 2;
Fearless, 156 Fed. 428, D. C. Pa.;
Moran, 254 Fed. 766, C. C. A. 2.

As the District Court said, for the "Pyramid" to proceed so close to the ends of *covered* piers, *masked* by them, set a *trap* for vessels proceeding from the slip (70). The fact that she was not properly answering her helm (58) made it all the more inexcusable for her to proceed along the pier heads:

S. A. Carpenter, supra.

B. In Blowing a Misleading Whistle, if Any.

The only whistles of the "Pyramid" heard by the "Four Sisters" were the four short blasts blown just as the vessels came together (43, 47). Davis, the only *disinterested* witness in the case (57) *heard no other* whistles from the "Pyramid" (54, 55, 56).

But the "Pyramid's" master claims to have blown two whistles before the four: one long blast *as she backed out of pier 17* (58) and a second blast when she was *abreast of pier 19* (58, 63). Her *engineer,* however, mentions only the four (64-66), as does *her only other witness,* a deck-hand (66-69).

If the "Pyramid" blew the two other whistles to which her master testified, the first was the usual "slip whistle" blown as she left pier 17 (58, 61), which both the answer to the libel, and the cross-libel fix at 7:35 A. M. (17, 22); and the second was blown when she was off pier 19 (63), very considerably later. It may here be noted that, while both the answer and the cross-libel admit that the collision happened at 7:45 A. M. (14, 16, 22), as alleged in the libel (8), her engineer says she did not leave pier 17 until 7:55 (64), and that her log showed the collision at 8:10 or 8:05 (65).

The District Court properly held (70) that, under the circumstances, these two widely separated whistles, even if heard, *not only would not have given any warning that the "Pyramid" was shaving the pier head of 21, but would have misled the "Four Sisters" into believing that the "Pyramid" was entering or leaving another slip.* It also properly held that the only whistle from her which by any possibility could have warned the "Four Sisters" of her dangerous maneuver would have been a rapid series of whistles, indicating danger.

The specious character of appellant's argument on pages 15 to 18 of its brief requires no demonstration. It is significant that appellant's brief cites no authority for it. Rule V (Brief for Appellant, 15, 16) prescribes only whistles for vessels "nearing a short bend or curve, in the channel" and for vessels moving "from their docks", in neither of which situations was the "Pyramid". Her own master said that the first whistle to which he testified indicated that she was *leaving pier 17* (58, 61), and that the second, blown off pier 19, indicated that she was *entering a dock* (63). Of course, the "Four Sisters" was not in sight when she blew either the first or the second.

C. In Throwing Her Bow to Port Upon Sighting the "Four Sisters".

The master of the "Pyramid" testified that when he saw the "Four Sisters" he reversed to full speed astern and ported his helm, *so making "her bow swing to port"* (63). She could not have done anything more effectual to trap the "Four Sisters" than to thus throw her bow *toward her.* It is to be remembered

that *the "Pyramid" is 161 feet long* (7, 12). When her bow bobbed around the corner of pier 21, if the "Four Sisters" had continued on her course she unavoidably would have run into the "Pyramid", and if the "Four Sisters" had thrown her bow to starboard she would have run into pier 21. *She did the only thing that was possible to avoid collision: backed and at the same time swung her bow to port* (42, 48, 69). The "Pyramid" by throwing *her* bow to port negatived the effect of this proper move of the "Four Sisters" *in extremis.*

Hampton, on the other hand, says that the "Pyramid" neither backed nor changed her course before the collision (43, 47, 48), and Davis does not think she changed her course (56). In that event the "Pyramid" was at fault *for not backing and for not throwing her bow to starboard* to avoid the collision.

Cotopaxi, 20 Fed. (2nd) 569; 1927 A. M. C. 1383, C. C. A. 2;

Moran, 254 Fed. 766, C. C. A. 2.

III.

THE "FOUR SISTERS" WAS NOT AT FAULT.

Appellant's brief charges the "Four Sisters" with three faults, which may be very shortly shown to be without the slightest foundation. *"But the offending vessel always accuses",* as Judge Kerrigan quoted, before stating the following principle, with which this Court is familiar:

> "Significantly, the rule laid down repeatedly by the *Supreme Court* is, that where fault on the part

of one vessel is obvious and inexcusable, the evidence to establish that of another must be clear and convincing to make out a case for apportionment (citing cases)."

Munrio-Tejon, 1926 A. M. C. 639 at 643, N. D. Cal.

Here the faults of the "Pyramid" are so numerous, so glaring, and so fully account for the collision that the case is *precisely* within that rule. Moreover, the record *positively* shows that the "Four Sisters" was wholly innocent.

A. The Whistle of the "Four Sisters" Was Efficient and the Signal Blown Upon it Proper.

The record conclusively shows that the "Four Sisters'" whistle was efficient. Hampton said it was an efficient whistle (45), that it had been recently inspected and required no repairs (45, 46). This the certificate of inspection of the United States inspectors confirms (40, 41). The disinterested Davis, on pier 23 near the bulkhead, heard it when it was blown "farther out than half way" (53, 54, 57). *The "Pyramid's" master conclusively proved its efficiency by testifying that in the afternoon of the same day on which the collision occurred he heard it "a quarter of a mile" away* (60).

John Arbuckle, 185 Fed. 240 at 243-4, C. C. A. 2;

R. H. Williams, 46 Fed. 414, E. D. N. Y.

It is significant that *neither the engineer nor the deck-hand* of the "Pyramid", although called as witnesses, testified *that they did not hear* the whistle, *admittedly* blown by the "Four Sisters" (64-69). The

only witness for the "Pyramid" therefore, who *said he did not hear* the "Four Sisters'" whistle is the "Pyramid's" master (59). W. H. Larkin (one of several stevedores on the "Four Sisters" 49, 50, 51) did not hear it for the very good reason that he was in the noise of the "Four Sisters'" engine room, reading the paper and paying no attention (52).

Appellant's other criticism of the whistle is that it should have been blown *later* than it was blown. Davis said that when she blew the whistle he was *"farther out than half way"* (53). Hampton pointed on the chart to the point *(unmarked)* where she was when it was blown, and described it as "about half way down" (45). It was a *"long blast* of the whistle" (42), *so that by the time it was completed she was much further out.*

> "The act does not fix any precise time at which this signal is to be blown. The time would apparently depend upon the circumstances of the case, e. g., if the vessel were lying high up in a deep dock or if her exit were obstructed by other vessels, notice *might be more effective if given after than before she began to move."*
>
> *Bangor,* 212 Fed. 706, C. C. A. 2.

It is submitted that no more proper point to blow the long blast on the whistle could have been chosen than the place where it was sounded; and had it been deferred until a later time appellant would now be protesting *because it was not blown sooner.*

B. The Speed of the "Four Sisters" Was Proper.

Davis testified that the "Four Sisters" was proceeding *"3 or 4 miles an hour"* (53). Hampton said she

left at *half speed* (42) and did not change (45), and that her half speed is *"about 5 miles an hour"* (45). Such a speed, on an admittedly "clear and fair" day (8, 13, 23) was certainly not excessive. It was no faster than a man can walk. *Judge Brown said that 6 or 7 knots per hour* would be a proper speed for a ferry in going out of a slip:

Chicago, 78 Fed. 819 at 823, D. C. N. Y.

Furthermore, any speed of the "Four Sisters" did not contribute to the collision. She would have avoided the collision by backing and throwing her bow to port, but for the gross faults of the "Pyramid". As the District Judge pointed out, in proceeding out of the slip the "Four Sisters" *had a right to rely upon proper navigation by other vessels:*

> "The steamer was going slow enough to avoid anything at the pier, and that was not flagrantly violating the law."
>
> *S. A. Carpenter,* 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

It hardly lies in the mouth of the "Pyramid", which *improperly was shaving the pier heads at a speed of 3 1/2 to 4 miles per hour* (59) to criticise the "Four Sisters" for *properly coming out of her slip at the same speed.*

Transfer No. 8, 211 Fed. 965, C. C. A. 2.

C. The "Four Sisters" Maintained a Proper Lookout. In Any Event the Absence of Another Lookout Did Not Contribute to the Collision.

The day was fair and clear, as heretofore noted. The "Four Sisters" certificate of inspection shows that she

was a one man boat (40, 41). Hampton was this man, and was in the pilot house, looking forward, his eyes 12 feet above the deck, and nothing to obstruct his vision (49). The only other men on board were stevedores (49, 50, 51).

The Court is here respectfully requested to look at the photograph of the "Four Sisters", in evidence as Exhibit 3 (41) which clearly shows where Hampton was. It is evident from it that no bow lookout was necessary on a clear day.

In any event, *the absence of a bow lookout had nothing to do with the collision,* as the District Judge pointed out. Hampton saw the bow of the "Pyramid" *the moment it "bobbed around" the northeast corner of pier 21* (42, 45) and immediately threw his own bow to port and backed (42, 48, 69). A lookout in the bow *could not have seen the "Pyramid" any sooner.* It is to be remembered that pier 21 was *covered by a building* to the end, so high that no one on either vessel could see over it, or, of course, around it (50). *The bow of the "Four Sisters", it must be remembered, had not passed the end of pier 21, but was about 60 feet west of it* (59, 46, 47, 55) *when the "Pyramid" "bobbed around" the end of it. It was therefore not visible from the bow of the "Four Sisters' any sooner than it was from her pilot house.* Said the bow lookout of the "Pyramid":

> "Q. Where was *your boat* when you first saw the 'Four Sisters'?
>
> A. *The first I saw of the boat was about even with the north-end corner of 21.*
>
> Q. Where was the 'Four Sisters'?
>
> A. *The 'Four Sisters' was about down here"* (67).

Of the two vessels, only the "Pyramid" had passed by pier 21.

Precisely in point is the already mentioned decision of the Circuit Court of Appeals *reversing* the District Court holding relied upon in appellant's brief, pages 22, 23:

> "The ferry boat *could not* see any portion of the schooner *until clear of the pier head,* and, *when clearing,* her forward lookout saw the schooner '15 or 20 feet away' drifting down. Engines were promptly reversed * * *".
>
> "As for the lookout, he was in place before anything *could* be seen north" (here south) "of the line of the slip, and he saw the schooner *as soon as anyone could see it.* The ferry boat was without fault."
>
> *S. A. Carpenter,* 18 Fed. (2nd) 99; 1927 A. M. C. 638, C. C. A. 2.

So is another decision cited in appellant's brief, page 23, wherein District Judge Chatfield said:

> "Neither boat had a lookout stationed directly at the bow, but the captain of the 'Edouard Alfred' claims that he saw the 'Livingston' *at about the time her bow actually came out from behind the pier and her pilot house showed in front of the pier shed. The absence of a lookout on the 'Edouard Alfred', therefore, made no difference in the situation.*"
>
> *Edouard Alfred,* 261 Fed. 680 at 683;
>
> *M. Moran,* 254 Fed. 766 at 767, C. C. A. 2; appellant's brief, p. 13.

The evidence is clear that *the "Four Sisters" saw the "Pyramid" as soon as the "Pyramid" saw the "Four Sisters",** notwithstanding the "Pyramid" as-

*"Neither vessel was aware of the proximity of the other until a few seconds before the impact."
Brief For Appellant, p. 2

serts that she had a lookout in the bow. This is proved by the testimony and pleadings concerning the sounding of the danger signal by the "Pyramid". It was sounded immediately when she saw the "Four Sisters" (14, 17, 23, 58, 67, 68); and this was practically simultaneous with the collision (43, 47, 54, 55, 56, 64, 68). It is also proved by the testimony and pleadings showing that each vessel saw the other at the same distance away (17, 23, 46, 47, 59, 67).

It is respectfully submitted that the interlocutory decree should be affirmed, with costs to appellee.

Dated, San Francisco,
March 17, 1928.

BELL & SIMMONS,
W. S. ANDREWS,
GOLDEN W. BELL,
Proctors for Appellee.

No. 5278

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HOTCHKISS REDWOOD COMPANY, a Corporation,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

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REPLY BRIEF FOR PLAINTIFF IN ERROR

At the outset it may be pointed out that counsel's argument that the capital stock tax if applied to plaintiff would be a direct tax on property and, therefore, unconstitutional because not apportioned according to population, begs the question at issue in the case at bar, namely, whether or not plaintiff was doing business, since it is based upon the assumption that plaintiff was not doing business. The authorities are clear that the tax is an excise imposed "upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization." *Flint v. Stone Tracy Company,* 220 U. S. 107, 145; *Hecht v. Malley,*

265 U. S. 144; *Central Union Trust Company v. Edwards,* 287 Fed. 324, certiorari denied 43 Sup. Ct. 541; *Washington Water Power Company v. United States,* 56 Ct. Clms. 76.

Whether or not plaintiff was doing business depends upon whether speculating in timber lands is "business" within the meaning of the capital stock tax law. In February, 1928, two decisions, throwing light on this question were handed down by the District Court for the Western District of Pennsylvania in the cases of *Harmar Coal Company v. Heiner,* and *Indianola Coal Company v. Heiner,* both of which involved companies engaged in holding coal lands for sale or development, and doing the acts incidental to such business. Copies of these opinions which have not, as yet, been reported are appended to this brief. The Court's conclusion, that these companies were doing business, was based upon the decisions of the Supreme Court in *Flint v. Stone Tracy Company,* 220 U. S. 107; *Von Baumbach v. Sargent Land Company,* 242 U. S. 503; *Edwards v. Chile Copper Company,* 270 U. S. 452; and *Phillips v. International Salt Company,* 274 U. S. 718. In the latter case, the Supreme Court on May 2, 1927, in a per curiam opinion reversed the decision of the Circuit Court of Appeals for the Third Circuit, 9 Fed. (2d) 389, on authority of its decision in the *Chile Copper Company case, supra.* The case involved the taxable years beginning July 1, 1918, and ending June 30, 1922. The facts, as stated in the Circuit Court's opinion, were as follows:

> "The Salt Company was a holding one, its assets consisting of the stocks of subsidiary companies which were 'carrying on and doing business' and

paid excise tax for so doing. The only acts the company did and which are alleged to warrant the imposition of the tax were as follows: Prior to 1908 it had bought and since owned all the capital stock of the Retsof Mining Company. That company then had outstanding a mortgage issue. Between March 1st, 1918, and February of 1919 the Salt Company bought ten of such mortgage bonds, and from March 1, 1919, to December 31, 1919, by purchase or exchange it became the owner of fifteen more. During 1920 it made several like purchases and also exchanged certain of its own bonds for 179 bonds of the Retsof Company. On March 27, 1918, it endorsed a note of $150,000.00 given by the International Salt Company of New York to the Irving Trust Company, and on September 25, 1918, a like note of $70,000.00. The maker of the note was one of the subsidiary companies above described, whose entire stock was owned by the plaintiff.

"During 1920 the plaintiff received as a dividend from the Retsof Company, as a stock dividend, the entire capital stock of the Avery Rock Salt Company, and in June, 1921, it received from the International Salt Company of New York as a dividend a majority of the capital stock of the Detroit Rock Salt Company and the entire stock of the Eastern Salt Company. On March 26, 1919, the plaintiff endorsed the note of a subsidiary company for $86,500.00, with which the latter bought Liberty bonds. From time to time the plaintiff has, to meet its current expenses, taxes, for the purchase of its own bonds for its sinking fund or to buy Retsof bonds, had money advanced to it by its subsidiary, the Salt Company of New York. All such advances were repaid by crediting them on the dividends later declared by the latter company on its own stock held by the plaintiff."

On the basis of these facts, the Circuit Court held that the company was not doing business, the reasoning of the court being as follows:

"Looking on the present case in the light of previous decisions in this and other circuits, McCoach v. Minehill Co., 228 U. S. 295; Lewellyn v. Pittsburgh E. L. & R. Railroad Co., 222 Fed. Rep. 177; and Public Service Rwy. Co. et al. v. Herold, 229 Fed. Rep. 902, we feel none of these acts constitute doing business in the purview of the statute. The owning of stock, the receipts and distribution of dividends, the endorsing of the notes of a company whose stock it held, the purchase of bonds for retirement or sinking-fund purposes, amount to no more than acts incidental to the ownership of property. They are not the positive, aggressive acts incidental to the active carrying on or doing business for gain, but rather the receipt of the gains of business capitalized in ownership. Sensing the words in their common everyday meaning we are of opinion that Congress, however it might treat the gains of this company as income, did not mean to place an excise tax on the capital stock of such a company as one 'carrying on or doing business.' Its purpose was to put an excise tax on the company really carrying on or doing business—in this case the subsidiary company—and not on the shareholder of the subsidiary, who was in receipt of the profits arising from such acts carrying on or doing of business. Thus regarding the plaintiff's acts, the judgment below is reversed and the cause remanded for further procedure."

It will be noted, that in comparison with the activities of the Chile Copper Company, the activities of the International Salt Company were of very limited scope consisting chiefly of buying its own bonds for retirement under a sinking fund agreement and bonds of the Retsof Mining Company, a 100 per cent owned subsidiary. These activities were, in effect, nothing more than the payment by the Salt Company of its own debts. In addition, the Salt Company also owned and voted the stock of subsidiary companies, endorsed notes

of a subsidiary on two or three occasions to enable the subsidiary to borrow funds, and received advances from a subsidiary, from time to time, for use in paying current expenses and buying its own bonds, and Retsof Company's bonds, such advances being later credited against dividends due from the subsidiary. The fact that these activities were held by the Supreme Court on authority of the Chile Copper Company case to be doing business indicates that the principles laid down by the Court in the Chile Copper Company case are in the nature of general tests to be applied in determining whether a company is doing business.

The United States District Court for the District of Minnesota in August, 1927, held in the case of *Conhaim Holding Company v. Willcuts, Collector,* 21 Fed. (2d) 91, that a corporation which had been organized to hold, conserve, and liquidate the assets belonging to an estate was doing business within the meaning of the Capital Stock Tax Law although during the taxable period it was "not actively engaged in business." The opinion of the Court reads in part as follows:

> "In December, 1920, the plaintiff, Conhaim Holding Company, was incorporated under the laws of Minnesota. Its main object was to hold and conserve the assets belonging to the estate of Louis Conhaim, deceased, to liquidate them when that could be done advantageously, and to distribute their avails among the stockholders of the corporation. The estate consisted of stocks, leaseholds, timber land and life insurance renewal commissions. The corporation has maintained an office, but has no employees. It has never dealt in securities. It has never sold the timber land because no opportunity has arisen to sell it. No income is re-

ceived from it. The secretary of the corporation receives a salary of $100 a year for his services and is an auditor and accountant. The income of the corporation consists of dividends upon the stocks, renewal commissions upon life insurance written by Louis Conhaim in his lifetime, and rentals from the leaseholds. Numerous loans have been made by the corporation to its stockholders, who—with the exception of a son-in-law and the secretary, who hold qualifying shares—are the heirs of Louis Conhaim. One loan was made to the American Security Company at the request of the son-in-law. The loans were apparently made for the accommodation and benefit of the stockholders, but interest was paid and collected. In some cases, the company has loaned its credit to the stockholders, and in other cases, when in funds, has permitted them to have the use of funds, paying the current rate of interest therefore. No distribution of assets or income has been made, and the carrying charges of the property require most of the income."

* * * * * * * *

"In Edwards v. Chile Copper Co., 270 U. S. 452, 455, Mr. Justice Holmes said of the corporation there involved:

'It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.'

"It is true that the Conhaim Holding Company was not engaged actively in business, but its purpose was to hold the assets of the estate until they could be disposed of advantageously and profitably, and then to distribute the avails. In the meantime it was to handle the stocks, leaseholds, lands and other assets in such a way as would be to the best

advantage of the corporation and those interested in it and so as to produce the largest amount for ultimate distribution, and that is what has been done. No distribution has been made because the time has not been reached when that can be done profitably.

"To my mind, the question is a very close one, and my first impression was that the company was not subject to the tax and should not have paid it; but I cannot escape the conclusion that the company is something more than a mere intermediary or agency for the stockholders. They chose the advantages of corporate organization as the best solution of the problem with which they were confronted, and the best and most profitable means of disposing of the assets of Louis Conhaim and their ultimate distribution. Concededly the corporation was organized to get a better price for these assets than was obtainable when it was organized, and the stockholders are receiving and will receive whatever gains may accrue by reason of its corporate activities in connection with the holding of the property for a better price and the investment of the funds in the meantime. While it has these assets, it does and must necessarily do what any other corporation would do which owned such property and was holding it for sale at a profit.

* * * * * * * *

"Finding the facts to be as hereinbefore stated, I reach the conclusion that the defendant is entitled to judgment * * * ."

The following cases upon which plaintiff relies are distinguishable from the case at bar:

McCoach v. Minehill Railroad Company, 228 U. S. 295;

United States v. Three Forks Coal Company, 13 Fed. (2d) 631;

Eaton v. Phoenix Securities Company, 22 Fed. (2d) 497;

Cannon v. Elk Creek Lumber Company, 8 Fed. (2d) 996;

Fink Coal & Coke Company v. Heiner, Volume III, Commerce Clearing House 1928 Standard Federal Tax Service, page 8164;

Rose v. Nunnally Investment Co., 22 Fed. (2d) 102, (Certiorari denied March 6, 1928).

The *Minehill Company case, supra,* involved a corporation which was organized to engage in the railroad business, but prior to the taxable years involved it had leased its railroad properties to the Reading Company for a term of 999 years, and during such taxable years it merely maintained its corporate existence, received rentals from the leased premises, interest from bank balances, and dividends from personal assets known as a contingent fund in the form of investments, and distributed such amounts to its stockholders. The Minehill Company made no changes in its investments during the taxable years in question. It did not invest or reinvest its funds, but merely received the income from its investments. In speaking of these investments, this Court said (p. 306):

> "There remains to be considered the fact that the Minehill Company has a considerable amount of personal assets known as its 'contingent fund,' in the form of investments (the amount and particulars are not specified), from which it derives an annual income of about $24,000; that it keeps a deposit in bank, receives and collects interest upon such deposit, and distributes the income thus received, as well as the rentals received from the Reading Company (after payment of expenses and taxes), to its stockholders in the form of dividends.
>
> "In our opinion the mere receipt of income from the property leased (the property being used in

> business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property."

Thus, unlike plaintiff the Minehill Company had gone out of the business for which it was organized, and merely received and distributed income from the leased property, management of which was in the lessee, dividends on investments and interest on bank deposits and the like. Manifestly, this case is not authority for the proposition that a corporation which pursuant to its charter purpose was engaged in speculating in timber lands.

The cases of *Three Forks Coal Company* and *Phoenix Securities Company, supra,* are distinguishable on the facts. These companies were merely depositaries for stock of certain other corporations.

In the *Elk Creek Lumber Company case, supra,* the timber lands in question were not purchased for purposes of speculation, as in the instant case, but were bid in by bondholders to protect their bonds on foreclosure sale. It is submitted that this situation is different from that of a corporation which is organized for the purpose of acquiring lands for speculative purposes. Moreover, this case was decided prior to the *Chile Copper Company* and *International Salt Company* decisions.

The *Fink Coal and Coke Company case* involved a corporation which had been organized for the purpose

of acquiring and operating coal properties. Prior to the taxable period the project of operating the mines was abandoned, due to the failure of a railroad to extend its line to the property. During the taxable years, the directors were authorized by the stockholders to sell the properties, but no sales were ever made. Here also, the company had abandoned the purpose for which it was organized.

The *Nunnally Company case* involved a corporation which, prior to the taxable years, had sold its candy business, and pursuant to its original charter powers, had invested the proceeds of the sale, approximately $2,500,000.00, in sound securities and notes of its stockholders yielding an average steady rate of from 6 per cent to 7 per cent. During each taxable year, the corporation reinvested in the same sort of securities approximately $200,000.00 resulting from the maturing of bonds and payments of loans and approximately $100,000.00 derived from the profits of the company. The latter amount was invested because it was desired to build up a reserve to meet disputed income tax claims pending against the company, and also because of the policy of the company of paying a stated semi-annual dividend of $50,000.00. The corporation also loaned about $6,000.00 to employees of a corporation in which it owned stock. While these activities were held by the District Court and Circuit Court of Appeals not to be doing business, it is not conceded that the decisions were correct. See *Conhaim Holding Company v. Willcuts,* 21 Fed. (2d) 91. However, the investment by the Nunnally Company of surplus in staple stocks and other

securities in order to provide funds for paying disputed tax claims, and the reinvestment of amounts derived from maturing of bonds and payment of outstanding loans savors less of business than does speculating in real estate. The refusal of the Supreme Court to grant the Government's application for certiorari in the Nunnally Company case is in no sense equivalent to an affirmance of the decision of the Circuit Court of Appeals in that case. *Talcott, Executrix, v. United States,* decided by this Court on January 20, 1928; *Hamilton Shoe Company v. Wolfe Brothers,* 240 U. S. 251, 258.

In *Monroe Timber Company v. Poe,* 21 Fed. (2d) 766 (Dist. Court of Wash.), plaintiff sued to recover capital stock taxes paid by it for the three fiscal years, July 1, 1922, to June 30, 1925, on the ground that it was not doing business and that its activities were exclusively restricted to the holding of its properties, which consisted entirely of timber land in the State of Oregon, and doing only such acts as were necessary to the maintenance of its corporate existence and the private management of its purely internal affairs.

The pertinent part of the Court's opinion reads:

> "Plaintiff purchased, in 1906, 1907, and 1908, approximately 8,000 acres of timber land, which it has been holding since about 1912 for purposes of sale. In July, 1922, plaintiff purchased 160 acres of land. In December, 1923, it sold 1,080 acres of land. The purchase in 1922 and the sale in 1923 are sufficient, so far as the second and third causes of action are concerned, to take the case out of the proviso exempting a corporation 'not engaged in business.'

"A business such as that of plaintiff's, in its essence, consists of buying and selling, and whether it was engaged in business during the periods in question depends rather on the character of its transactions than on their amount and volume. Von Baumbach v. Sargent Land Co., 242 U. S. 503, 516 and 517, 37 S. Ct. 201, 61 L. Ed. 460. The fact that the purchase of 160 acres was for a strategic purpose, to enable plaintiff to compel another company to haul plaintiff's timber from its holdings, if desired, does not affect the question. While, in one sense, it may have been a defensive measure, yet the court must conclude that such purchase increased the value of its other holdings, and therefore was, as planned, a shrewd business step. It was an additional investment, tending to increase the value of the other lands.

"During the period between June 30, 1921, and July 1, 1922, the only things that can be considered at all in the nature of business transactions by plaintiff were the receipt of payments on a sale theretofore made, and the loaning to its principal stockholder of amounts realized from such sale, together with receipts on account of such loan or loans. Such acts, while in one sense the engaging in business, are primarily incidental to business theretofore done, and the holding of property theretofore acquired. Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co., 228 U. S. 295, 33 S. Ct. 419, 57 L. Ed. 842. Plaintiff is entitled to recover on its first cause of action. If the act is construed as imposing such a tax, it would imperil its constitutionality."

The error of the Court in this case consists in failing to recognize that the holding of the timber pending its enhancement in value is as much an indispensable and

necessary element of the business of speculating in timber lands as is the buying and selling of the lands. Viewed in its proper relation to the business as a whole such holding is not a mere incident of ownership, but is active and forms an inseparable part of an effort in the pursuit of profit and gain. There is no essential difference between the business of speculating in timber lands and dealing in the ordinary forms of commodities except that a much longer period as a rule is required in order to effect profitable sales of real estate. The fact that a person engaged, let us say, in the business of dealing in automobiles might not make a sale for a long period would certainly not mean that he was not engaged in business. Similarly, the fact that plaintiff, although endeavoring to make sales of its lands during the taxable periods, did not do so, does not mean that plaintiff was not carrying on a business.

Plaintiff's activities were not limited merely to the owning and holding of property under lease and the distribution of its avails, *(Von Baumbach case p. 516),* or to receiving the ordinary fruits that arise from the ownership of property. *(Minehill case p. 306).* "It was organized for profit and was doing what it principally was organized to do in order to realize profit." *(Chile Copper Company case, p. 455.)* It was engaged in "managing" its properties, *(Flint v. Stone Tracy Company case, p. 171)* and endeavoring to bring about a sale thereof for profit. Respondent, therefore, substantially exercised and enjoyed the privilege of doing business with the advantages arising from corporate organization, and hence was subject to the capital stock

tax. It is respectfully submitted, therefore, that the judgment of the District Court should be reversed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

LYNDON H. BAYLIES,
Attorney, Bureau of Internal Revenue.

APPENDIX

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA.

HARMAR COAL COMPANY, a Corporation of the State of Pennsylvania,

vs.

HEINER, Collector.

OPINION

(February, 1928).

SCHOONMAKER, Judge:

A jury trial was waived in this case. It is a suit to recover the amount of certain capital stock excise taxes alleged to have been erroneously collected from the plaintiff for the taxable period from July 1, 1921, to June 30, 1923. The taxes involved were levied under Section 1000 of the Revenue Act of 1918 (40 St. 1057-1126), and Section 1000 of the Revenue Act of 1921 (42 St. 227-294), respectively. This section of both acts is the same. Both statutes impose "a special excise tax with respect to carrying on or doing business." Both exempt "any corporation which was not engaged in business * * * during the preceding year ending June 30th."

The plaintiff claims exemption because it was not engaged in business during any of the taxable periods.

We make the following findings of fact in this case:

FINDINGS OF FACT

On the 19th of December, 1923, the plaintiff paid to the defendant, capital stock excise taxes for the year ending June 30, 1921, $2027.00; for the year ending June 30, 1922, $2025.00; for the year ending June 30, 1923, $2028.00; aggregating $6080.00. In due form, the plaintiff filed with the Commissioner of Internal Revenue, claims for refundment of each of said taxes respectively, which refundment was entirely rejected by said Commissioner. Thereafter, the plaintiff brought this suit for the recovery of these taxes.

The plaintiff is a Pennsylvania corporation, chartered in 1912 for the purpose of "mining, preparing for market and selling coal, manufacturing and selling coke and such other minerals as may be incidentally developed, and their products."

Another corporation by the name of the Bessemer Coal & Coke Company, also a Pennsylvania corporation, organized the plaintiff corporation, and has been its sole stockholder since organization. The plaintiff acquired certain coal properties in the years 1912 and 1913, but never operated any of them for the production of coal therefrom. In its capital stock tax returns, the plaintiff stated its business as that of "buying and selling coal lands." In a letter to the Deputy Commissioner of Internal Revenue, its attorneys stated the purpose of organizing the plaintiff corporation as follows:

"Purchasing, leasing and acquiring coal lands of operating, controlling and managing properties for the mining of coal and the manufacture of coke in the State of Pennsylvania, and other states; of mining, preparing for market, selling and shipping coal and its products, and of purchasing, leasing, renting, and acquiring in the State of Pennsyl-

vania, and other states, land and other property necessary or convenient in mining, preparing for market and shipping coal and its products and doing the business of the company."

Prior to the taxable periods in question in this suit, the plaintiff had sold some of its coal lands, but, during the taxable years, held four hundred acres of undeveloped coal lands. These coal lands were subject to certain mortgages, either existing at the time of purchase, or given to secure balance of purchase money, on which the Bessemer Coal & Coke Company paid, during the taxable periods, the interest and certain installments of principal. This latter company likewise paid, during the same period, the taxes accruing against the plaintiff company, its legal expenses, and premiums on fire insurance on a building owned by the plaintiff. The several items of disbursement were charged by the Bessemer Coal & Coke Company to the plaintiff, and were credited to that company by the plaintiff upon its books.

During the taxable periods, the plaintiff also owned all of the capital stock of still another Pennsylvania corporation, i. e., Indianola Coal Company. This stock was purchased prior to the taxable periods involved here. The plaintiff paid part cash therefor and gave notes for the balance of the purchase money, some of which were liquidated as they fell due during the taxable year, by the Bessemer Coal & Coke Company; and they were credited to that company upon the books of the plaintiff.

In addition to that, during the taxable period, namely, on or about September 21, 1920, the plaintiff acquired title to a house and lot on Franklin Street, North Side, Pittsburgh, Pennsylvania, subject to a mortgage of $2500, the payment of which by the Bessemer Coal &

Coke Company for the account of the plaintiff constituted the entire consideration. The legal title to this piece of real estate had been in the name of an officer of the Bessemer Coal & Coke Company for about twenty years prior to this date, as a trustee for that company which furnished the money to buy it. This conveyance was made at the request of the Bessemer Coal & Coke Company. This real estate was rented at an annual rental of approximately $400.00.

During the taxable period, the plaintiff held directors' meetings, elected officers, and maintained its corporate existence.

CONCLUSIONS OF LAW

Under this state of facts, we concluded that the plaintiff is not entitled to recover, and that judgment should be entered for the defendant.

DISCUSSION

We arrive at this conclusion, because, in our opinion, the plaintiff corporation was carrying on, or doing business during the taxable periods.

In arriving at this conclusion, we have noted very carefully the various decisions of the Supreme Court bearing upon the question of corporate liability to this excise tax.

We note, first, that the tax is assessed upon "doing business," and business has been defined by the Supreme Court in the case of Flint v. Stone Tracy Co., 220 U. S. 107-171 as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People v. Commissioner of Taxes, 83 N. Y. 242, 244. 'That which occupies the time, attention and labor of men

for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. I, page 273."

We note further that the decision in each case must depend upon the particular facts before the court, and that in Von Baumbach v. Sargent Land Co., 242 U. S. 503-516, the Supreme Court, Mr. Justice Day delivering the opinion, had this to say with reference to the test applicable to such facts:

> "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

Then, again, the Supreme Court, further dealing with this subject in the case of Edwards v. Chile Copper Company, 270 U. S. 452, had this to say with reference to the application of this statute:

> "The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit."

In the instant case, we find that the plaintiff corporation was organized for profit, and was doing what it principally was organized to do, to realize profit. It, therefore, comes strictly within the interpretation of the Supreme Court in the case of Edwards v. Chile Copper Company, supra.

The Supreme Court again spoke on the same subject in a per curiam opinion handed down on the 2nd day

of May, 1927, in Phillips v. International Salt Company, reversing, on the authority of Chile Copper Co. v. Edwards, supra, the decision of the Circuit Court of Appeals, 3rd Circuit, reported in 9 Fed. (2nd) 389, which had held that the salt company having received and distributed dividends, endorsed notes of a company whose stock it held, and purchased bonds for the retirement or sinking fund purposes, was not doing business.

The Supreme Court has held in the cases of Zonne v. Minneapolis Syndicate, 220 U. S. 187; McCoach v. Minehill Railroad Company, 228 U. S. 295, that corporations which retained some active functions were not doing business, were companies which had ceased to do the business for which they were originally incorporated, and which had reduced their activities to the owning and holding of property and the distribution of the avails of that property, and which were doing only such acts as were necessary to continue that status.

We cannot find that the plaintiff falls within this class of cases. During the whole of the taxable period, it was continuing in the business for which it was incorporated, owned and held four hundred acres of coal lands, owned a house and lot and the stock of another coal company—all for the continued effort of profit and gain. The only case that we could find where a corporation which was carrying out the functions for which it was chartered, was held not to be doing business within the meaning of the statute, was the case of United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, where the characteristic charter function was the bare receipt and distribution to the stockholders of rent from a specified parcel of land. It was held by the Supreme Court to be a mere intermediary for the distribution of rent, and therefore not doing business. In no sense can

the plaintiff's situation fall within the intermediary class.

We, therefore, must conclude that this tax was justly collected from the plaintiff, and that the plaintiff cannot recover in this case.

Let an order be submitted for the entry of judgment in favor of the defendant.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA.

INDIANOLA COAL COMPANY, a Corporation of the State of Pennsylvania,

vs.

HEINER, Collector.

OPINION
(February, 1928)

SCHOONMAKER, Judge:

This action, and that of Indianola Coal Company v. C. G. Lewellyn, formerly Collector, No. 3073, were tried together. A jury trial was waived in both cases, and the cases were heard before the Court without a jury.

Both actions seek to recover capital stock excise tax alleged to have been erroneously collected under the provisions of Section 1000 of the Revenue Acts of 1918 and 1921. The same essential facts prevail throughout the taxable periods covered by each case. We, therefore, shall make but one finding of facts, which will be applicable to both cases.

From the pleadings and the evidence in these cases, we find the following facts:

The plaintiff paid to D. B. Heiner, Collector of Internal Revenue, the sum of $3,512.00 capital stock taxes, under the provisions of the Revenue Act of 1918, for the taxable year ending June 30, 1921. Under the provisions of the Revenue Acts of 1918 and 1921, the plaintiff paid to C. G. Lewellyn, the former Collector, $6,838.00, as capital stock taxes, for the taxable year

ending June 30, 1922, and June 30, 1923. Due application was made to the Commissioner of Internal Revenue for refundment of these taxes, which refundment was refused.

The plaintiff corporation was incorporated in 1906 under the laws of the State of Pennsylvania, with power to engage in "mining and producing coal and other minerals, the transportation to market and sale thereof in crude or manufactured form." Shortly after incorporation the plaintiff acquired a large acreage of undeveloped coal lands. A part of these lands was sold in the year 1917; and the remainder, approximately 5,000 acres, has since been held for sale or development. The plaintiff has never engaged in mining operation. In its 1921 capital stock tax return, the company stated that it was engaged "in mining coal and dealing in coal properties." In its 1922 and 1923 capital stock tax returns, its business is described as "buying and selling coal lands." Its entire capital stock is held by the Harmar Coal Company, a Pennsylvania corporation, whose capital stock is, in turn, held by the Bessemer Coal & Coke Company, also a Pennsylvania corporation. The business activities of the plaintiff, from July 1, 1919, to June 30, 1923, can be generally classified as follows:

(1) Maintained corporate existence, holding corporate elections, etc.

(2) Held for sale or development approximately five thousand acres of coal lands.

(3) Loaned money and received interest on loans made, borrowed money, and paid interest thereon.

(4) Paid taxes and legal expenses.

(5) Sold securities and bonds held by it.

(6) Bought in 1919, coal lands, one parcel for $10,321.20, and another for $128.70.

(7) In 1920, bought a parcel of land for $530.00.

CONCLUSIONS OF LAW

Under this state of facts, we conclude that the plaintiff was engaged in business within the meaning of the taxing statutes during the whole period covered by these two actions, and may not recover back these taxes paid by it. We make this finding for the reasons stated in an opinion this day filed in the case of Harmar Coal Company v. D. B. Heiner, at No. 3071 Law.

An order may be submitted for the entry of judgment in these two cases in favor of the defendant.

No. 5278

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HOTCHKISS REDWOOD COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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No. 5278

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF FACTS.

This is a suit brought by Hotchkiss Redwood Company, a corporation, defendant in error, hereinafter called the plaintiff, against the United States, plaintiff in error, hereinafter called the defendant, to recover the total sum of $9621.66 (and interest) assessed against and collected from plaintiff under the provisions of Section 1000 (1) of the Revenue Act of 1918 and Section 1000 (1) of the Revenue Act of 1921, as capital stock taxes for the five taxable years ending June 30, 1920, 1921, 1922, 1923, and 1924, involving the period from June 30, 1919, to and including June 30, 1924. The capital stock tax imposed by said revenue acts was "a special excise tax with respect to carrying on or doing business".

Section 1000 (2) (c) of the Revenue Act of 1918 and Section 1000 (2) (b) of the Revenue Act of 1921 contained the further provision that "the taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business * * * during the preceding year ending June 30, * * *".

Claim for refund of said sum of $9621.66, on the ground that plaintiff was not engaged in or doing business during said period and was exempt from the capital stock tax, was duly filed with the Commissioner of Internal Revenue as required by law, and denied by said Commissioner. Plaintiff then brought suit in the United States District Court for the Northern District of California, Southern Division, to recover said taxes, on the same ground. The court made special findings of fact (Tr. p. 22) and rendered judgment for plaintiff (Tr. p. 31), from which defendant sued out this writ of error.

The salient facts, summarized from the special findings of fact, are as follows:

Plaintiff is a California corporation, having been incorporated on June 19, 1919. In June, 1919, plaintiff acquired from the Hotchkiss Timber Company, a California corporation, all the assets of said corporation, which consisted of a tract of redwood timber land situate in the County of Del Norte, State of California, acquired by the Timber Company in 1906, and containing approximately 19,754.79 acres, in exchange for 17,541 shares of capital stock of plaintiff, which were issued to said Hotchkiss Timber Company

and by the latter distributed to its stockholders. Thereafter said Hotchkiss Timber Company was duly dissolved according to law.

The object of incorporating plaintiff was to expedite the sale and issuance of a new bond issue, secured by a mortgage on said tract of land, in order to pay off a bond issue owing by said Hotchkiss Timber Company and to avoid waiting the length of time which was required by law to elapse before said Hotchkiss Timber Company could lawfully put out a new bond issue. Upon its incorporation, plaintiff issued and sold bonds in the principal sum of $550,000, dated July 1, 1919, bearing six (6) per cent interest, secured by a mortgage on said tract of land, the proceeds of which bonds were used to pay off said prior bond issue of said Hotchkiss Timber Company.

Said Hotchkiss Timber Company and plaintiff, as its successor, acquired said tract of redwood timber land for the sole purpose of owning and holding the same and reselling it as a whole at a profit, if possible.

Neither said Hotchkiss Timber Company nor plaintiff ever intended or proposed to cut or market the timber on said tract of land, or any part thereof.

From its date of incorporation until June 30, 1924, plaintiff did not sell or dispose of said tract of land, or any part thereof, except a small strip of land which it conveyed to the County of Del Norte for highway purposes in the year 1920, and for the timber on which it received the sum of $5036.54. Said strip of land would have been condemned by said

County of Del Norte for highway purposes if plaintiff had not voluntarily conveyed it.

During all of said period plaintiff did not cut or sell or endeavor to sell any of the timber on said tract of land, except the timber on the land sold to the County of Del Norte; did not lease or endeavor to lease said tract of land, or any part thereof; did not receive any income, rents, profits or issues from said tract of land, or any part thereof, except said sum received from said County of Del Norte; did not own or have any interest whatever in any property, except said tract of land; had no other income, profit or receipts whatever, except the proceeds of assessments levied on the stockholders of plaintiff and the proceeds received from the bonds issued by plaintiff in 1919.

During said period the president of plaintiff occasionally had negotiations, on behalf of plaintiff, with prospective purchasers and also with brokers as to the sale of said tract of land. No person was employed by plaintiff to sell said tract of land, or any part thereof, and said tract of land was never advertised for sale.

During all of said period plaintiff had or engaged in no other activity whatever.

During all of said period plaintiff had no office of its own, but its books and corporate records were kept in the office of W. J. Hotchkiss, its president, in San Francisco, California.

From November 19, 1919, to June, 1923, plaintiff paid to L. M. Owens the sum of $50 per month as a salary for services rendered as secretary of plaintiff.

From July, 1923, to June 30, 1924, plaintiff paid the sum of $150 per month to said W. J. Hocthkiss on account of office expenses.

During all of said period plaintiff paid no other salaries, employment compensation or office rent whatever.

During all of said period plaintiff maintained its corporate existence and carried on its purely internal affairs, including the holding of necessary directors' and stockholders' meetings.

From time to time during said period plaintiff levied assessments on its issued capital stock to pay the taxes on said tract of land, interest on its bonded indebtedness and other necessary charges and expenses, and collected said assessments and paid said taxes, interest, charges and expenses.

II.

ARGUMENT.

A.

THE RULE IS WELL ESTABLISHED THAT THE OWNING AND HOLDING OF PROPERTY BY A CORPORATION, AND THE MAINTENANCE OF ITS CORPORATE EXISTENCE AND THE CARRYING ON OF ITS PURELY INTERNAL AFFAIRS, DOES NOT CONSTITUTE THE DOING OF BUSINESS BY SUCH CORPORATION SO AS TO MAKE IT SUBJECT TO CAPITAL STOCK TAX.

As has been seen from the statement of facts, plaintiff's activity during the period in question consisted in the owning and holding of a tract of timber land, in the maintenance of its corporate existence, in the

carrying on of its internal affairs and in the levying of assessments upon its stockholders to pay its taxes, carrying charges and office and miscellaneous expenses.

Our contention, succinctly stated, is that the owning and holding of property by a corporation, and the maintenance of its corporate existence and the carrying on of its purely internal affairs, does not constitute the doing of business by such corporation so as to make it subject to the capital stock tax. This has been established by a long line of federal decisions, of both the Supreme Court and the lower Federal Courts, some of which involved the capital stock tax and some the corporation excise tax imposed by the Corporation Excise Tax Act of 1909 (36 Stat. 112). The latter act also imposed a special excise tax "with respect to the carrying on or doing business" by a corporation, and, as is conceded by counsel for defendant, the decisions as to what constituted doing business under the 1909 Act are equally applicable to the case at bar.

There is no better statement of the rule than the quotation from the case of *Von Baumbach v. Sargent Land Co.,* 242 U. S. 503, 61 L. Ed. 460, which is set forth in defendant's brief, reading as follows:

> "It is evident from what this court has said in dealing with former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active

> and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

With this rule in mind, let us turn to cases where it has been applied—cases which we submit are directly determinative of this one, compelling the conclusion that plaintiff was not engaged in or doing business.

In *McCoach v. Minehill & Schuylkill Haven Railroad Co.,* 228 U. S. 295, 57 L. Ed. 842, it appeared that plaintiff had been incorporated to construct and operate a railroad in Pennsylvania. Later, by permission of the state legislature, it leased its railroad for ninety-nine years at an annual rental of $252,612, which brought a return of six (6) per cent upon its issued capital stock. Thereafter it maintained its corporate existence and organization, kept an office, paid salaries to its officers and clerks, and paid taxes, its expense for corporate maintenance being about $5000 per year and its taxes about $24,000 per year. It collected the annual rental and also had bank accounts on which it received annual sums of money as interest, and also maintained a contingent fund from which it received annual sums as interest or dividends amounting to about $24,000, and distributed its net proceeds annually to its stockholders in the form of dividends. The question was whether under such circumstances it was liable for the corporation excise tax imposed by the Act of 1909, and the Supreme Court held that it was not engaged in business and was not liable for the tax.

In *United States v. Emery, Bird, Thayer Realty Co.,* 237 U. S. 28, 59 L. Ed. 825, the Supreme Court held that the Realty Co. was not engaged in business so as to render it liable for the corporation excise tax, on the following facts:

The Emery, Bird, Thayer Dry Goods Co., a business corporation of Kansas City, Missouri, occupied certain lands, partly hired and partly owned by it, for the purpose of its business. Its members later organized the Emery, Bird, Thayer Realty Co. for the purpose of acquiring the dry goods company's lands and of letting the same to the dry goods company. The only business done by the realty company was to keep up its corporate organization and to collect and distribute the rent received from its single lessee. It also covenanted to rebuild in case the buildings were destroyed. Its charter powers included performing and enforcing the performance of the respective covenants in the leases taken over and the sale of the property or any part of it upon the vote of not less than two-thirds of the stockholders. The court said:

> "The claimants' characteristic charter function, and the only one that it was carrying on, was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged."

The case of *Lane Timber Co. v. Hynson,* 4 Fed. 2nd, 666, decided by the Circuit Court of Appeals of the Fifth Circuit, is exactly in point on its facts. The Lane Timber Co. was organized in 1906 and acquired

2,000 acres of land in Oregon, which it had owned ever since, and did not own any other property. It bought another tract in 1907, but sold it during the same year. Its charter authorized it to buy, sell and deal in real and personal property and stumpage, logs, timber and all kinds of building materials. By a contract entered into in 1906 the company employed agents and authorized them to sell its land, and from time to time, including the year for which the tax was collected, inquired of its agents as to the prospects of a sale. These agents had continuously made efforts to sell, but without success. The plaintiff also had an agent in Oregon upon whom process may be served. It had paid taxes on the land, but had received no revenue from it, maintained no office and had no employees. Basing its decision on *McCoach v. Minehill & Schuylkill Haven Railroad Co.,* supra, and the rule as laid down in the *Von Baumbach* case, supra, the court held that the company was not subject to the capital stock tax imposed by the Revenue Act of 1918, saying in part:

> "It is defendant's contention that a corporation which does what its charter authorizes it to do is liable for the corporation tax and that the plaintiff, because it was authorized to hold title to the land, and was doing so with the expectation of selling at a profit, was engaged in business. If a corporation is not engaged in business, it cannot make any difference that what it is doing is authorized by its charter. Owning land is not doing business, nor is paying taxes. Most owners of land, whether corporations or individuals, would be willing to sell at a profit. In our opinion the mere fact that the plaintiff selected agents who

made efforts to sell its land does not render it liable."

The government, in its brief, maintains that this case is not good authority and that the opinion of the dissenting judge is the correct one, but, in answer to this, it may be pointed out that, in the first place, the government did not apply to the United States Supreme Court for a writ of certiorari to have the decision of the Circuit Court of Appeals reviewed, and, in the second place, the decision has never been overruled or questioned in any later case. The government contends that this case is in conflict with the case of *Edwards v. Chile Copper Company,* 270 U. S. 452, 70 L. Ed. 678, which case will be discussed later; but it should be observed that the decision in the latter case was rendered more than a year after the decision in the *Lane Timber Company* case and, while it appears that the *Lane Timber Company* case was cited in the brief of counsel for the taxpayer, the Supreme Court in its opinion did not question the soundness of that decision.

In *Monroe Timber Co. v. Poe,* 21 Fed. 2nd 766 (District Court of Wash.), plaintiff sued to recover capital stock taxes paid by it for the three fiscal years, July 1, 1922, to June 30, 1925, on the ground that it was not doing business and that its activities were exclusively restricted to the holding of its properties, which consisted entirely of timber land in the State of Oregon, and doing only such acts as were necessary to the maintenance of its corporate existence and the private management of its purely internal affairs. It

appeared that plaintiff purchased in 1906, 1907 and 1908 approximately 8000 acres of timber land which it has been holding since about 1912 for purposes of sale. In July, 1922 plaintiff purchased 160 acres of land. In December, 1923 it sold 180 acres of land. The court was of the opinion that, in view of the purchase in July, 1922 and the sale in December, 1923, the plaintiff was doing business and was subject to capital stock tax for those taxable years, but the court further held that, for the fiscal year ending June 30, 1922, the company was not engaged in business and was entitled to recover the tax paid. This case is therefore another illustration of the rule that the owning of property does not constitute doing business.

In *Fink Coal & Coke Co. v. Heiner,* (District Court, Western District of Pennsylvania, not yet officially reported) (Volume III Commerce Clearing House 1928 Standard Federal Tax Service, page 8164), it appeared that plaintiff was incorporated in 1902 with the usual broad charter powers, for the purpose of acquiring 8000 acres of coal land in West Virginia. From time to time thereafter until 1906 it acquired about 2000 additional acres. Its main object was to mine and market its coal. There was a railroad to be built which would have served plaintiff, but the project was abandoned, and this left plaintiff without any practicable method of transporting its coal to market, so the mine was never opened. During the years in question the stockholders authorized the directors to sell the coal properties, but no sale was ever made. The directors and stockholders held meetings and as-

sessments were levied to pay expenses, including taxes and salaries of $100 and $15 yearly to the treasurer and secretary, respectively, and postage and other charges. The stockholders hoped that conditions would change and they would be able to sell the coal lands at a profit or mine the coal. The court held that plaintiff was not liable for the capital stock tax imposed by the Revenue Acts of 1918 and 1921, specifically basing its opinion on the test laid down in the *Von Baumbach* case, supra, and also on the case of *Lane Timber Company v. Hynson,* supra, and pointing out that the maintenance of its corporate existence and the ownership of property did not constitute the doing of business by plaintiff.

Four other recent decisions of Circuit Courts of Appeals approving the rule contended for here are:

United States v. Three Forks Coal Co., 13 Fed. 2nd, 631 (3rd Circuit);

Eaton v. Phoenix Securities Co., 22 Fed. 2nd, 497 (2nd Circuit);

Rose v. Nunnally Investment Co., 22 Fed. 2nd, 102 (5th Circuit);

and

Cannon v. Elk Creek Lumber Co., 8 Fed. 2nd, 996 (7th Circuit).

Coming now to the recent case of *Edwards v. Chile Copper Co.,* supra, upon which defendant chiefly relies, an examination of its facts will instantly disclose a situation which is not in point here. The Chile Copper Company, the company held liable for capital stock tax in that case, was a holding company, one in-

corporated to hold all the capital stock of the Chile Exploration Company. Furthermore, it was incorporated to meet a certain difficulty, to wit: the inability of the Exploration Company, which owned mines in Chile and needed large sums of money to develop them, to mortgage its property to raise the money. Hence, the Chile Copper Company was organized and it issued bonds secured by a pledge of all the capital stock of the Exploration Company and furnished the proceeds from time to time to the latter company to enable it to go on with its work. The gist of the decision is found in the following words of Mr. Justice Holmes:

> "In our opinion the plaintiff was liable to the tax. We do not rest our conclusion upon the issue of bonds in the first year or the call loans made in the last, and, for the same reasons, we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brain or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the act."

We think it is clear that there is nothing in this case which tends to question in any way the rule

established in the former cases that the ownership of property and maintenance of corporate existence does not constitute doing business. As a matter of fact, Mr. Justice Holmes himself makes this clear, for he goes on to say:

> "The case is not governed by McCoach v. Minehill & S. H. R., supra, and United States v. Emery, Bird, Thayer Realty Co., supra. It is nearer to Von Baumbach v. Sargent Land Co., supra."

In other words, the former cases establishing that rule are not only not questioned but, in effect, are approved and simply distinguished from the case at bar. Subsequent decisions have also remarked this. In *Eaton v. Phoenix Securities Company,* supra, it is said:

> "Edwards v. Chile Copper Co. recognized the continued authority of McCoach v. Minehill R. R. Co. and U. S. v. Emery, Bird, Thayer Realty Co. * * *."

In *Fink Coal & Coke Co. v. Heiner,* supra, the court said:

> "The defendant has cited Edwards v. Chile Copper Co., 270 U. S. 452 (U. S. Tax Cases 138), in support of his position, and has called attention to the following from the opinion by Mr. Justice Holmes:
>
> "'The exemption "when not engaged in business" ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.'
>
> "The Chile Copper Company case, with its intimation just quoted, unquestionably tends to limit the number of corporations 'not engaged in

> business'. But it is a case treating of the association of two corporations which was not the ordinary relation between a parent organization and a holding company, and was not designed to overturn all previous decisions of the Court and the principles therein set forth. In the opinion Mr. Justice Holmes, for example, cites the Emery, Bird, Thayer case and distinguishes it, but does not overrule it. The decision would be unduly extended if it were to be held that it sets aside the declaration in Flint v. Stone Tracy Co., 220 U. S. 107, repeated in McCoach v. Minehill Railway case to the effect that the corporation tax was not imposed upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation."

Similar observations are to be found in *Rose v. Nunnally Investment Company,* supra, and *United States v. Three Forks Coal Company,* supra.

The government also relies upon *Von Baumbach v. Sargent Land Co.,* supra, but that case is also distinguishable on its facts. There the corporations involved not only owned large tracts of timber land, from which the timber had been cut, and which contained valuable deposits of iron ore, but they leased part of the properties for the mining of iron ore, received certain royalties as rentals, sold certain parcels of real estate, sold stumpage from some of the timber properties and rented and leased certain other parcels of real estate, and, to insure the proper carrying on of the mining operations, employed another corporation, engaged in engineering and inspection of ore properties, to provide supervision and inspection of work upon their properties. The mere mention of these facts shows that the corporations in

question were engaged in various activities which naturally led the Supreme Court to hold that they were doing business, and further shows that the case is not an authority against us. Moreover, it was in this very case that the court, in the quotation hereinbefore set forth, laid down the rule that the owning and holding of property did not constitute doing business, and the case may be said to be an authority in our favor. It was because "their activities included something more than a mere holding of property and the distribution of the receipts thereof" that the court held those corporations taxable.

A possible contention of the government may appropriately be disposed of here. In the quotation from the *Von Baumbach* case, hereinbefore set forth, it will be noted that the court used the word "reduced", the phrase reading:

> "A corporation which has *reduced* its activities to the owning and holding of property."

In that quotation the court did not use the word "reduced" literally to mean a corporation which had necessarily engaged in greater activities and which then had cut down its activities to the owning and holding of property, but used it rather in the sense of "confined". Judge Gibson, in *Fink Coal & Coke Co. v. Heiner,* supra, makes this clear, saying:

> "The word 'reduced', doubtless adopted from the regulations promulgated by the Treasury Department by authority of the tax act, is synonymous with the word 'confined', as used in Von Baumbach v. Sargent Land Co., supra, and prior decisions."

And conclusive proof of this is found in the case of *United States v. Emery, Bird, Thayer Realty Co.,* supra, decided prior to the *Von Baumbach* case, where the corporation held not taxable had been specifically incorporated to take title to certain property and then lease the same to the dry goods company, and which therefore had not literally reduced its activities to the owning and holding of property, but had simply confined its activities thereto.

Defendant also contends that all the activities of plaintiff must be taken into consideration and that because plaintiff, in addition to owning and holding a tract of land, also managed it, executed a bond issue secured by a mortgage on it and raised money by assessments against the stockholders with which to pay taxes, carrying charges and expenses, it must be held to have been doing business during the period in question. The answer to this is that the rule is well established that, where a corporation's only purpose or activity is the owning and holding of property, the fact that it manages that property, receives the income from it, borrows money on it, maintains an office and pays taxes and expenses, and levies assessments on its stockholders, does not have the effect of making such corporation one which is doing or engaged in business within the meaning of the tax statutes. This was established in *McCoach v. Minehill & S. H. R. Co.,* supra, where the corporation in question received an annual rental of $252,612, had bank deposits on which it received interest annually, had a contingent fund, the annual income from which was $24,000, paid state taxes of about $24,000, maintained an office and

paid salaries to its officers and employees at an annual expense of about $5000, and where the court nevertheless held the corporation was not doing business and was not taxable. In this connection the court used the following language:

> "But that reasoning furnishes no support for the contention that the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof, constitute such a business as is taxable within the meaning of the act of 1909. The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders. In the former case the tax is payable; in the latter not."

The *McCoach* case is, in fact, stronger than the present one, for the Hotchkiss Redwood Company had no income whatever during the period in question (disregarding the one sale in 1920 to the County of Del Norte) and had to pay its expenses out of the proceeds of stockholders' assessments. The language which the court used in *Flint v. Stone Tracy Co.,* 220 U. S. 107, 55 L. Ed. 389, is also pertinent here:

> "It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of

corporate or insurance business and with respect to the carrying on thereof."

B.

IF THE CAPITAL STOCK TAX WERE HELD TO APPLY TO PLAINTIFF, THE TAX WOULD BE A DIRECT TAX ON PROPERTY AND THEREFORE VIOLATIVE OF ARTICLE I, SECTION 9, CLAUSE 4, AND ARTICLE I, SECTION 2, CLAUSE 3, OF THE UNITED STATES CONSTITUTION, AS NOT APPORTIONED TO THE STATES ACCORDING TO POPULATION.

There is a further ground for denying plaintiff's liability for the tax in question. As the evidence shows, plaintiff is the owner of a tract of timber land and is not engaged in any other activity and had no income during the period in question. Under such circumstances, the imposition of the capital stock tax on plaintiff is necessarily the laying of a direct tax on plaintiff's tract of land, the only property owned by it, which tax would be unconstitutional under Article I, Section 9, Clause 4, and Article I, Section 2, Clause 3, of the United States Constitution, since the tax is not apportioned to the states according to population.

And several cases have so held.

In *Fink Coal & Coke Co. v. Heiner,* supra, it is said:

> "The contention of the defendant herein, if upheld, would have the effect of making the taxing statute impose a direct tax upon the property of the corporation—a power not possessed by Congress unless apportioned to the states according to population."

In *Monroe Timber Co. v. Poe,* supra, Judge Cushman said:

> "If the act is construed as imposing such a tax, it would imperil its constitutionality."

In the District Court opinion, in the case of ***Rose v. Nunnally Investment Co.,*** 14 Fed. 2nd, 189, it is said:

> "If the only substantial corporate activity is the ownership and preservation of real and personal property, the receipt of its ordinary income, which arises from the property itself, rather than from active use and management of it, and the distribution of such income to the stockholders, with only such corporate organization and activity as is necessary thereto, there is not such a doing of business as is meant by the act. While such activity is 'business' in a broad sense, a tax upon such business would be in substance one on the mere ownership of property, becoming thus a direct tax and beyond the power of Congress, except when apportioned to the states according to population."

See, also, *Flint v. Stone Tracy Co.,* supra.

We are unable to perceive how the government can avoid this constitutional difficulty.

In conclusion, we respectfully submit that:

1. The rule is well established that the owning and holding of property by a corporation and the maintenance of its corporate existence, and the carrying on of its purely internal affairs does not constitute the doing of business so as to render such corporation subject to the capital stock tax.

2. The rule is also well established that, where the corporation's sole activity consists in the owning and holding of property, the fact that it also manages that property, borrows money on bonds secured by a mortgage thereon, maintains an office and incurs expenses yearly for taxes, salaries of officers and employees, and other charges which it meets by levying assessments upon its stockholders, does not have the effect of rendering such corporation one which may be said to be doing business within the purview of the capital stock tax act.

3. Under the rules hereinbefore set forth, it follows conclusively as a matter of law that plaintiff was not doing business during the period in question and was not subject to capital stock tax.

4. If the capital stock tax were held to apply to plaintiff, the tax would be a direct tax on property and therefore unconstitutional, as not apportioned to the states according to population.

5. Because of all of the foregoing, the judgment appealed from herein should be affirmed.

Dated, San Francisco,
March 12, 1928.

Respectfully submitted,
JONES & DALL,
Attorneys for Defendant in Error.

ESMOND SCHAPIRO,
Of Counsel.

No. 5280

United States

Circuit Court of Appeals

For the Ninth Circuit.

16

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a Corporation,

Appellant,

vs.

TITLE GUARANTEE & TRUST COMPANY, a Corporation; THE MORTGAGE CORPORATION OF AMERICA, a Corporation, and THERON WALKER, styling himself and doing business as THERON WALKER ENGINEERING & CONSTRUCTION COMPANY,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Los Angeles Review, Law Printers, 224 Court Street, Los Angeles, Calif.

No.

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INDEX

(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur).

INDEX—Continued

NAMES AND ADDRESSES OF ATTORNEYS

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Suite 407 Law Building, 139 North Broadway,
Los Angeles, California.

For Appellee:

CLORE WARNE, ESQ.; SAMUEL C. COHN, ESQ.,
Suite 806 Union Bank Building, 325 West Eighth Street,
Los Angeles, California.

CITATION

UNITED STATES OF AMERICA—SS.

To Title Guarantee & Trust Company, a corporation; The Mortgage Corporation of America, a corporation; and Theron Walker, styling himself and doing business as Theron Walker Engineering and Construction Company—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within 30 days of date hereof, A.D. 1927, pursuant to an order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit wherein the Paramount Motors Corporation of the Pacific, a corporation, is complainant, and you are defendants to show cause, if any there be, why the decree entered July 7th, 1927, in the said suit mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward J. Henning, United States District Judge for the Southern District of California, this 13th day of September, A.D. 1927, and of the Independence of the United States, the one hundred and fifty-first.

EDWARD J. HENNING,
U. S. District Judge for the Southern District of California.

Received copy of the above citation this 13th day of September, 1927, at Los Angeles, California. Samuel C. Cohn and Clore Warne, Attorneys for Defendants.

(Endorsed): Filed Sept. 15, 1927, R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,

Complainant,

vs.

TITLE GUARANTY & TRUST COMPANY, a corporation, et al,

Defendants.

No. J 85 H

MOTION TO RESTORE CAUSE TO THE DOCKET

IT APPEARING to the Court that the Mandate of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, issued upon appeal from the decree entered herein on the 2nd day of April, 1926, sustaining Defendant's motion to dismiss the Bill herein and dismissing said Bill, has heretofore been filed herein, but by inadvertence no order has been entered in conformity with the directions of said Mandate,

IT IS NOW ORDERED that this cause be restored to the docket for further proceedings in accordance with said Mandate and that Defendant's motion to dismiss Complainant's Amended Bill of Complaint be and the same is hereby overruled.

AND IT IS FURTHER ORDERED that Defendant's answer to said Amended Bill, heretofore filed herein stand as the answer to said Amended Bill.

Done this 28th day of February, 1927.

(SEAL) EDWARD J. HENNING.

(Endorsed): Filed Feb. 28, 1927, R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause]

No. J 85 H

ANSWER OF TITLE GUARANTEE & TRUST CO., a corporation, and MORTGAGE CORPORATION OF AMERICA, a corporation, TO AMENDED BILL OF COMPLAINT

Now come Title Guarantee & Trust Company, a corporation, and Mortgage Corporation of America, a corporation, and for answer to the amended bill of complaint of complainant herein filed, admit, deny and allege as follows:

I.

Answering paragraph I. these answering defendants have no information or belief wherewith to affirm or deny that complainant is a corporation created and organized under the laws of the State of Delaware, and/or is a citizen of that state, and basing their denial on that ground, deny said allegation and the whole thereof.

II.

Answering paragraph II. these defendants have no information or belief wherewith to affirm or deny the allegations therein contained, hereinafter so denied, and basing their denial on such grounds, deny that complainant was created and/or organized for the purpose of acquiring, and/or owning and/or selling real estate, and/or engaging in manufacture, and/or for other like purposes; and deny that complainant had, prior to November, 1924, acquired an interest in a certain tract of land at Azusa in Los Angeles County, in said Southern

District of California, which had been subdivided and/or was being sold on sales contracts and/or on time payments under its designation Subdivision 8507, also known as Paramount Heights Subdivision, or otherwise, or at all; and deny that complainant had advanced and/or loaned to said subdivision the sum of $11,965.00, or any other sum or amount whatsoever, which was to be repaid to complainant under a trust arrangement being conducted through the Bank of America, out of the proceeds of the sale of lots of said tract, or otherwise, or at all.

III.

Answering paragraph III. these answering defendants deny that Theron Walker estimated the cost of the building erected, in said paragraph III referred to, at the sum of $17,000.00.

IV.

Answering paragraph IV. these defendants deny that prior to the making of said contract in paragraph III referred to said Theron Walker had represented to complainant that one, H. E. Seaton, would provide the money for financing said building, taking the notes of complainant for $17,000.00, and/or that accordingly complainant, at the instance of said Walker, executed to said Seaton its first note dated December 1st, 1924, for the sum of $12,500.00, payable in installments of $800.00 or more on the first of each month beginning August 1st, 1925, and continuing until December 1st, 1925, when the residue should be paid, and to secure the payment thereof executed a deed of trust of even date, with the defendant Title Guarante & Trust Company as Trustee, for the benefit of said Seaton, and/or at or about the same time executed to said Seaton, by direction of said Walker, a

note for the sum of $4500.00, payable in installments and to secure payment thereof executed to said Title Guarantee & Trust Company, as Trustee for the benefit of said Seaton, a deed of trust upon said 20-acre tract of land.

V.

Answering paragraph VI. these answering defendants deny that complainant executed and/or delivered to said Theron Walker an instrument in writing assigning and/or transferring to him the said alleged claim and/or demand of $11,965.00 against said Paramount Heights Subdivision, as payment pro tanto or as payment in any wise upon said notes so held by the said Theron Walker, and deny that said assignment and/or claims were so accepted by said Walker. That these defendants have no information or belief wherewith to affirm or deny the allegations hereinafter denied and basing their denial upon such ground deny that complainant caused notice of said assignment of said claim or demand, above referred to, to be given to the Bank of America which was receiving and disbursing the proceeds of said lot sales under a trust designated as Bank of America Trust No. 243, and caused written instructions and/or directions to be given said Bank to pay to said Theron Walker, as assignee of complainant forty per cent of the funds coming into said Trust up to said sum of $11,965.00, payments to be made on the first of each month as said Walker should direct, beginning February 1st, 1925. Deny that ever since said alleged assignment payments were made on account to either of the defendants herein under and by virtue of said assignment. That these answering defendants have no information or belief wherewith to affirm or deny the allegations hereinafter denied and basing their denial on

such ground, deny that at the time of said alleged assignment of sales of lots in said subdivision amounting to $38,000.00, or any other sum or amount, forty per cent of which amount up to the sum of $11,965.00, was payable to complainant upon its alleged loan or advancement to said subdivision enterprise, either as receipts from sales or otherwise, or at all; and deny that said receipts were then coming in to the credit of complainant at the rate of between $400 or $500 per month, or any other sum, either with reasonable expectations that said receipts would rapidly increase to $800 per month, or otherwise, or at all.

VI.

Answering paragraph VII. these answering defendants admit that for a valuable consideration said Walker thereafter assigned and transferred said $12,500. note, and his rights under the deed of trust securing the same, to the defendant, Mortgage Corporation of America, but deny that he assigned to said defendant corporation the alleged claim and demand of $11,965.00, except under the terms and conditions hereinafter more fully set forth.

VII.

Answering paragraph VIII. these answering defendants deny that payment of the sum of $11,965.00 was made to defendant Walker, and admit that the sum of $750.00, being three payments of quarterly interest in the sum of $250.00 each, due under the terms of said $12,500.00 promissory note was paid by complainant to Mortgage Corporation of America, defendant.

VIII.

Answering paragraph IX. these answering defendants

deny that complainant received no consideration on account of the execution of said promissory note, in the sum of $12,500.00, either as therein alleged, or otherwise, and deny that said defendant, Mortgage Corporation of America paid said Walker no money for said notes or said claims, either as therein alleged, or otherwise, or at all; and allege the fact to be that full, valid and valuable consideration was paid by defendant, Mortgage Corporation of America to the said Theron Walker, for and in consideration of the assignment to it of said $12,500. promissory note and deed of trust.

IX.

Answering paragraph X. these answering defendants deny that at the time of the transfer and assignment of said alleged $11,965.00 account to said Walker by complainant that the same was in payment upon said two notes of $12,500.00 and $4500.00 respectively, and deny that complainant gave no direction to the said Walker as to particular distribution and/or application of said assigned claim, and deny that said application was to be as payment between said two notes; and deny that said assignment has been applied to and/or has extinguished said $4500.00 note; and deny that there is to be applied approximately $7465.00, or any other sum or amount whatsoever, on the $12,500.00 note. These answering defendants deny that no more than $5000.00 of the principal and/or a small amount of interest is or can be now owing on said $12,500.00 note, and allege the fact to be that the whole of said principal sum, to-wit, the sum of $12,500.00, together with accrued interest thereon and together with accrued costs and charges of foreclosure, remain due, owing and unpaid; that no offer or tender

of payment of said sum or any part thereof has been made for or on behalf of complainant.

X.

Answering paragraph XI. these answering defendants admit that the defendant, Mortgage Corporation of America, is claiming and demanding of complainant the full sum and principal of said note together with interest and charges thereon; and admit that these defendants are preparing to sell said real property covered by said deed of trust, but deny that said sale and said action, or any action whatsoever, on the part of these defendants in this regard will cause complainant great and/or immediate and/or irreparable damage.

XI.

Answering paragraph XII. these answering defendants have no information or belief wherewith to affirm or deny the allegations therein contained and basing their denial on such ground, deny each and every allegation in said paragraph contained.

XII.

Answering paragraph XIII. these answering defendants deny that the reasonable market value of said land and property covered by said trust deed, which is to be sold pursuant to the terms thereof, is not less than the sum of $55,000.00, and allege the fact to be that the value of said land is not in excess of the sum of $12,500.00, or thereabouts.

XIII.

Answering paragraph XIV. these answering defendants allege that they have no information or belief where-

with to affirm or deny the allegations therein contained and basing their denial on such ground, deny that complainant is able and/or willing and/or ready to pay the sum and amount due and owing on said note, and deny that complainant is not indebted to Mortgage Corporation of America but alleges the fact to be that it is indebted in the full amount of the principal sum together with accrued interest, costs and charges, as hereinbefore stated.

XIV.

Answering paragraph XV. these answering defendants deny that complainant has no means of preventing said threatened foreclosure sale and alleged sacrifice of its property except to submit to the unjust, or any unjust, and/or unlawful and/or extortionate demands of said defendants or either of them, and/or pay the same; deny that complainant has no plain and/or speedy and/or adequate remedy at law to prevent or redress the wrongs complained of, or any remedy except such as a court of equity can afford.

SECOND DEFENSE

For a second, separate and distinct defense to the amended complaint herein filed, these answering defendants allege:

I.

That neither said amended complaint nor any part or paragraph thereof states facts sufficient to constitute a cause of action against said defendants, or either of them.

THIRD DEFENSE

For a third, separate and distinct defense to the amended complaint herein filed, these answering defendants allege:

I.

That heretofore, to-wit, on or about the 24th day of November, 1924, complainant was desirous of constructing upon land and premises in said amended complaint described a certain factory building and then and there entered into a building contract with one, Theron Walker, doing business as Theron Walker Engineering & Construction Co. whereby said Walker contracted to erect and construct a certain building according to the plans and specifications in the contemplation of the parties and in said contract specifically referred to, for a total consideration of $17,000.00 then agreed upon to be paid by complainant to the said Theron Walker by the delivery to him of a promissory note in the sum of $12,500.00 secured by first deed of trust upon the land and premises in said amended complaint described and the remaining portion of said contract price by a promissory note in the sum of $4,500.00 to be secured by a second deed of trust upon said premises, and that the said Theron Walker was to receive said promissory notes in full payment for all work, labor and material to be furnished in the erection of said building, in accordance with the terms and conditions of said contract referred to.

II.

That thereafter and on or about the first day of December, 1924, and pursuant to the terms of said building contract and in accordance with the agreement of the parties, complainant made, executed and delivered to said Theron Walker as part payment of the consideration to be paid said Walker under said contract, its promissory note in said sum of $12,500.00 payable to a nominee of said Walker, one H. E. Seaton, which said promissory note was secured by a deed of trust to the Title Guaran-

tee & Trust Co., a corporation, as Trustee, deeding and conveying the real property described in said complainant's amended complaint to said Trustee under terms and conditions as in said deed of trust set forth, and which said promissory note together with endorsements thereon is in words and figures as follows, to-wit:

TRUST DEED NOTE

Installments in this note to not include interest. Keep this note when paid for it must be returned with the Deed of Trust, to the Title Guarantee and Trust Company, who will cancel and retain it, before the release of the Trust Deed will be executed.

$12,500.00 Los Angeles, Cal. December 1, 1924.

For value received we promise to pay the sum of Twelve Thousand Five Hundred Dollars, in installments of Eight Hundred ($800.00) or more Dollars, each due on the first day of every month beginning August 1st, 1925, and continuing until December 1st, 1925, on which date the remaining unpaid balance of Nine Thousand Three Hundred ($9,300.00) Dollars shall be paid, at Los Angeles, California, all principal unpaid to bear interest from date until paid at the rate of eight per cent per annum, payable quarterly. Should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of the principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a Deed of Trust to the Title Guarantee and Trust Company, and may be registered when accompanied with the Deed of Trust duly recorded, on presentation at the Company's office.

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, A Corporation,

S. S. Smith, Vice-President.

(Corporate seal) Chas. H. Horton, Secretary.

And bears endorsement upon the reverse side thereof in words and figures as follows:

Los Angeles, Calif. Dec. 4th, 1924.

For value received I do hereby transfer and assign to the Theron Walker Engineering and Construction Co. the within note without recourse to me, together with all rights accrued or to accrue under this deed of trust securing the same so far as the same relate to this note.

H. E. Seaton.

Los Angeles, Calif. .....192.....

For value received I do hereby transfer and assign to the ....., the within note without recourse to me, together with all rights accrued or to accrue under the Deed of Trust securing the same so far as the same relate to this note.

.....

Los Angeles, Cal. Dec. 18, 1924.

For value received I, Theron Walker, going under the name of Theron Walker Engineering and Construction Co., do hereby transfer and assign to the Mortgage Corporation of America the within note, together with all rights accrued or to accrue under the Deed of Trust securing the same so far as the same relate to this Note, and do hereby guarantee the payment of this Note, and waive presentment, demand, protest and notice of protest.

THERON WALKER ENGINEERING & CONSTRUCTION CO.

By Theron Walker.

Mar 21-1925 Interest $250.00 paid to Mar. 1, 1925.
June 20-25 " $250.00 " " June 1, 1925.
Sept. 12-25 " $250.00 " " Sept. 1, 1925.
July 4-1925 Ins. added to prin. $327.57, bal. remaining unpaid $12,827.57

Unpaid Balance $12,827.57
Interest paid to Sept. 1, 1925.

HELLMAN COMMERCIAL TRUST & SAVINGS BANK.

Sixth & Main Sts.
Los Angeles, Calif.

By.....Behrman,
Collection Dept.

III.

That thereafter the payee of said $12,500.00 promissory note and the beneficiary under said deed of trust, to-wit, said H. E. Seaton, duly assigned said promissory note and said deed of trust to the said Theron Walker.

IV.

That thereafter and on or about the 18th day of December, 1924, and in the regular course of business the said Theron Walker offered for sale to the defendant, Mortgage Corporation of America, the said $12,500.00 promissory note of complainant, secured by said deed of trust, all duly assigned as aforesaid, and then and there stated and represented to the said defendant, Mortgage Corporation of America that said note and trust deed had been delivered to him as part payment of consideration to be paid to him under and pursuant to building contract between said Theron Walker and complainant, as hereinbefore referred to, and then and there stated and represented that he was the holder and owner thereof and offered to sell the same to said defendant, Mortgage Corporation of America; and thereafter, to-wit, on or about the 18th day of December, 1924, said Theron Walker did sell and said defendant, Mortgage Corporation of America, did buy said promissory note and trust deed and did pay therefor to the said Theron Walker the sum of $10,000.00 to be paid to said Theron Walker or upon his order and demand as and when said building was progressively completed, final payment to be made after notice of completion had been duly filed showing completion of said building and having a mechanics' lien guarantee from recognized title company showing said land and premises free of all mechanics' and material men's liens, and that thereafter and pursuant to said con-

tract of sale and purchase said defendant, Mortgage Corporation of America, paid said total consideration of $10,000.00 in the manner aforesaid, and that the Mortgage Corporation of America is now and at all times since said December 18, 1924, has been, the owner and holder of said $12,500.00 promissory note and trust deed.

IV.

That at the time said sale was made by the said Theron Walker to the defendant, Mortgage Corporation of America, and pursuant to the terms and conditions thereof, complainant herein, by its proper officers, duly signed and executed a certain offset statement and representation of indebtedness and delivered the same to said defendant, Mortgage Corporation of America, which said owner's offset statement is in words and figures as follows:

OWNER'S OFFSET STATEMENT

Los Angeles, California,
December 18, 1924.

Union Bank & Trust Co. of Los Angeles
Gentlemen:—

In reply to your request of recent date, will say that I am the maker of the certain promissory note dated December 1, 1924, made in favor of H. E. Seaton and secured by a Trust Deed recorded in Book....., Page..... of Official Records of Los Angeles County, and covering a certain 20.00 Acre Parcel—East and West Center line of which is the Center Line of Paramount Street; a portion of Lots 11 and 12, Subdivision No. 2 Azusa Land and Water Company, as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, California.

That I am the owner of the premises covered by the said Trust Deed.

That the unpaid balance of the note secured by the said Trust Deed is $12,500.00.

That the interest on said notes has not been paid at the net rate to not paid;

That the so-called net rate of interest is 8% per annum;

That I have no offsets, claims nor defense against said note except as stated above.

I understand that the said Note and Trust Deed have been assigned and that the new owner's name and address is Mortgage Corporation of America, 310 Union Bank Bldg., Los Angeles, California.

Name: PARAMOUNT MOTORS CORPORATION OF THE PACIFIC.

Address: Chas. H. Norton,
Secy.

The above is correct
H. E. Seaton
by Theron Walker Engineering & Construction Co.
Theron Walker.

V.

That said promissory note by its terms provides for the payment of $800.00 or more on the first day of each and every month beginning August 1st, 1925, and continuing until December 1st, 1925, on which date the remaining unpaid balance of $9300.00 is required to be paid and that there was due upon said promissory note, according to the terms thereof, the sum of $800.00 August 1st, 1925, September 1st, 1925, and October 1st, 1925, together with the interest thereon at the rate of eight per cent per annum payable quarterly. That complainant regularly paid the quarterly installments of interest due upon said promissory note to and until the first day of September, 1925, but that no payments were ever made upon the principal of said note and that complainant herein defaulted in the payment thereof according to its terms and continued in default thereof to and until the 21st day of October, 1925.

VI.

That defendant, Mortgage Corporation of America, duly made demand upon complainant for the payment of said principal sums due upon said note, and for the payment of accrued interest thereon, and that complainant failed and refused and continues to fail and refuse to pay the same or any part thereof, and that on or about the 21st day of October, 1925, said defendant, Mortgage Corporation of America, made its demand upon said defendant, Title Guarantee & Trust Co., a corporation, Trustee in said deed of trust, in the form provided by law and the terms of said deed of trust, declaring all of the indebtedness secured by said deed of trust due and payable at once, and caused to be filed in the office of the County Recorder of the County of Los Angeles where said property securing the debt is located, a notice that said debt was due and unpaid and that it elected to have all of the property described in the deed of trust sold to satisfy the debt and costs, and that three months after the filing of said notice under the provisions of said deed of trust and accordance with the law in such cases made and provided, said defendant, Title Guarantee & Trust Company, Trustee therein, was required and is required to proceed to sell said above granted property, or so much thereof as in its discretion is necessary in order to accomplish the objects of said trust, to-wit, the payment of said debt, and that said defendant, Title Guarantee & Trust Company, in accordance with the terms of said deed of trust, did cause to be printed and published notices of said sale and that said sale should be at public auction at the time and place in said notice stated, to the highest bidder.

VII.

That neither said promissory note nor any part thereof has been paid except the payments of quarterly installments of interest, as hereinbefore set forth, and that the whole of said sum remains due, owing and unpaid, together with accrued interest at the rate of eight per cent per annum from the first day of September, 1925.

WHEREFORE these defendants pray that complainant take nothing by its amended complaint herein filed, for costs and all proper relief.

SAMUEL C. COHN
CLORE WARNE
Solicitors for defendants, Mortgage Corporation of America and Title Guarantee & Trust Company.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

M. G. KREINMAN, being first duly sworn, says: That he is president of defendant, Mortgage Corporation of America; that he has read the foregoing answer to amended complaint and knows the contents thereof and that same is true of his own knowledge except as to matters therein stated on information or belief and as to those matters he belives it to be true.

M. G. KREINMAN.

Subscribed and sworn to before me this 29th day of December, 1926.

(SEAL) SAMUEL C. COHN,
Notary Public in and for said County and State.

(Endorsed): Filed Dec. 31, 1926, R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk.

Refiled, Pursuant to Order of Court this Jan. 28, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause]

No. J 85 H

ORDER DENYING COMPLAINANT'S MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL

This cause came regularly on to be heard on the motion of complainant for leave to file its amended and supplemental bill, on the 27th day of April, 1927, and said motion was made by said complainant and submitted to the Court for its consideration and decision, and the court having duly considered the same, and affidavits filed in support thereof and opposition thereto, and the briefs of solicitors for the said parties, now therefore,

IT IS ORDERED that the said motion of complainant for leave to file amended and supplemental bill be, and the same hereby is, denied.

Dated this 24th day of June, 1927.

Edward J. Henning,
Judge.

Approved as to form as provided
in Rule 45.

M. F. Stiles,
Caesar A. Roberts,
Solicitors for Complainant.

(Endorsed): Filed Jan. 24, 1927. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause]

No. J 85 H

AMENDED AND SUPPLEMENTAL BILL

To the Honorable Judges of said Court:

COMES NOW again your orator, Paramount Motors Corporation of the Pacific, by leave of court, and exhibits

this its amended and supplemental bill of complaint against the defendants herein and respectfully shows unto your Honors:

I.

That heretofore your orator filed its original bill herein and afterwards its amended bill, in which amended bill it was alleged that your orator was a corporation and citizen of the State of Delaware, the Mortgage Corporation of America and the Title Guarantee and Trust Company were corporations and citizens of the State of California, resident and doing business in the Southern District thereof, and Theron Walker was a citizen of said state of California and an inhabitant of said district, and that this was a suit of a civil nature in equity, and that the value of the matter in dispute herein exceeded the sum or value of $3,000.00, exclusive of interest and costs; that your orator was created for the purpose of acquiring, owning, holding, and selling real estate, and engaging in manufacture, and for other like purposes, and prior to November, 1924, had acquired an interest in a certain tract of land at Azusa, in said district, which had been subdivided and was being sold out in lots under the name of Paramount Heights, Subdivision No. 8507, to which project your orator had loaned the sum of $11,965.00, to be repaid out of the sale of lots under a trust arrangement with the Bank of America at Los Angeles, and had acquired another tract of twenty (20) acres of land at said Azusa, upon which your orator desired to construct a factory building, and for that purpose, on or about November 28, 1924, entered into a contract with the defendant Walker, doing business under the name of Theron Walker Engineering and Construction Company, for the construction of such building for the sum of

$17,000.00; that prior to making the said contract the said Walker had represented to your orator that one H. E. Seaton would provide him with the money for financing said building operation, taking notes of your orator therefor, and accordingly your orator executed its notes for the sums of $12,500.00 and $4,500.00 respectively to said Seaton, dated December 1, 1924, payable in installments of $800.00 or more per month until December 1, 1925, when the residue was to be paid, and to secure such payment executed two deeds of trust upon said twenty-acre tract of land to the Title Guarantee and Trust Company; that said Seaton failed to pay any money to your orator or to said Walker, and on December 4, 1924, assigned the said notes and deeds of trust to said Theron Walker Engineering and Construction Company, and that your orator had since been informed by said Walker that said Seaton was merely the "nominee and agent" of said Walker and not an independent actor.

II.

That it was further averred in said amended bill that after the said transfer of said notes to said Walker your orator assigned to said Theron Walker Engineering and Construction Company the said $11,965.00 demand upon the Paramount Heights Subdivision as payment pro tanto upon said notes, which was so accepted by said Walker and notice of said assignment was given to the bank receiving and disbursing said funds and direction given said bank by your orator to pay said Theron Walker Engineering and Construction Company monthly forty (40%) per cent of moneys coming into said fund up to said sum of $11,965.00, the lot sales then amounting to about $38,000.00, which assignment said Walker filed with said Bank, which thereafter made all payments

on said account to said Walker, or his assigns, as he or they directed; that said Walker about December 18, 1924 assigned said $12,500.00 note and deed of trust and said $11,965.00 claim to the defendant, Mortgage Corporation of America, besides which your orator paid to the said Mortgage Corporation of America $750.00 interest claimed to be in arrears; that your orator received no consideration from Seaton for said notes, nor any consideration therefor except the Walker building contract and work done thereunder; that Walker paid Seaton nothing for said notes, and the mortgage company paid Walker no money but took said assignments upon an agreement to pay Walker's construction bills, to a limited amount, as they should accrue; that when your orator assigned said $11,965.00 account to Walker your orator did not direct the application thereof as between said two notes, but avers upon information that $4,500.00 thereof was applied to and extinguished said $4,500.00 note, leaving $7,465.00 to be applied upon said $12,500.00 note; notwithstanding all of which the Mortgage Corporation of America was claiming of your orator the full amount of $12,500.00 and interest and had demanded that the trustee of said deed of trust proceed to foreclose same by sale of the trust property, alleged to be worth $55,000.00, and said trustee had filed in the County Recorder's office of said Los Angeles County a notice of default and was threatening to sell your orator's said land and would sell the same, to the irreparable injury of your orator, unless restrained by this court from so doing; that your orator was ready, able and willing to pay whatever sum your orator should be found to be justly owing, if any, to the holder of said note, but

averred that the same would not greatly exceed the sum of $5,000.00.

Your orator, therefore, prayed an injunction to prevent the threatened sale of said land and for other and general relief.

All of which matters and things will more fully and at length appear from said amended bill, which is hereby referred to and all allegations of which, excepting so far as they are hereinafter modified, varied or departed from, are hereby adopted and made part of this amended and supplemental bill as fully as if they were here reiterated and set forth in extenso.

III.

Now, in amendment of and supplemental to said amended bill of complaint your orator further alleges and shows unto your Honors:

That in all negotiations and dealings aforesaid and in making of said notes to said H. E. Seaton the officers and agents of your orator, acting therein and in your orator's behalf, never came into personal contact or direct communication with said Seaton and had no knowledge or information concerning him except such as was derived from said Walker, who represented to the agent of your orator conducting the matter of making said notes, that said Seaton was a capitalist or money-lender and would provide to said Walker on your orator's account the money for financing the construction of said factory building, and your orator, with that understanding and in that belief, executed said notes aggregating $17,000.00 and deeds of trust securing the same; but long after the making of said notes and during the pendency of this suit, the defendants filed herein an affidavit of said Walker in which he stated, among other things,

that the said Seaton was "the nominee and agent" of said Walker, and your orator, assuming and supposing such statement to be true, and on the warrant of said affidavit, averred in its amended bill, afterwards filed herein, that the said Seaton was such "nominee and agent"; and believing and assuming from the face of the papers and the claims of defendants that the said Seaton had actually assigned to Theron Walker Engineering and Construction Company the said notes and deeds of trust for $12,500.00 and $4,500.00 respectively, your orator averred in said amended bill that said Seaton had so assigned them; but your orator later and since the taking of evidence herein, on the 8th day of April, 1927, has been informed by the said H. E. Seaton and verily believes and therefore, upon information and belief now avers that the said Seaton was not the agent of the said Walker, that he never assigned or otherwise transferred the said notes and deeds of trust, or either of them, to the said Walker or to the Theron Walker Engineering and Construction Company, or to any person or corporation, and never authorized the said Walker, or any other person, to assign said notes or deeds of trust or to take any action whatsoever in his, the said Seaton's name, in the premises, and your orator never signed the name of said Seaton to the purported assignment of said notes and deeds of trust. Your orator, therefore, is advised and does aver that no title to the said notes passed to the said Walker or Theron Walker Engineering and Construction Company by the purported assignment thereof in the name of said Seaton; and that no title to said $12,500.00 note or any right of foreclosure of said deed of trust passed to the defendant, Mortgage Corporation of America, by the attempted or pretended assignment of said note and deed of trust

by said Theron Walker Engineering and Construction Company, or otherwise, and that said defendant has no such right.

IV.

That because of your orator's want of knowledge or information, as aforesaid, at the time of filing the amended bill herein your orator could not set forth therein all the facts and matters herein now set out and now presents the same at the first opportunity by this further amended and supplemental bill.

V.

And your orator further shows:

That prior to commencement of this suit the defendant, Title Guarantee and Trust Company, at the instance of defendant, Mortgage Corporation of America, had published notice of intended sale of said twenty acres of land by way of foreclosure of said deed of trust, claiming that there was then due thereon the full sum of $12,500.00 and certain interest and alleged disbursements and expenditures aggregating approximately $500.00 to $600.00 additional, but upon the filing of the bill herein such sale was suspended; but upon dismissal of the amended bill, upon motion to dismiss, notice of proposed foreclosure sale was again published, in which notice the amount claimed to be due was the sum of $15,729.37 and it was recited therein that the Mortgage Corporation of America "has been obliged to and has paid out and advanced the sum of $2,579.43 for the purpose of protecting the interests of said trust, said payment and advancement having been made in accordance with the provisions of said trust deed." Upon perfecting the appeal from the decree dismissing said amended bill, the threatened sale

was restrained by the appellate court, pending the hearing of said appeal, but the said defendants still make claim to the said sum of $15,729.37 as chargeable against your orator under said trust deed.

VI.

That your orator is informed by counsel for the defendants, and believes and upon information and belief charges, that $2,000.00 of said sum of $2,579.43 alleged to have been paid out and advanced by the defendant, Mortgage Corporation of America, "for the purpose of protecting the interests of said Trust," consists of counsel fees allowed by the said defendant, Mortgage Corporation of America, to its attorneys and counsel herein for defending this suit and not for any purpose of protecting the interests of said trust, nor was the same made in accordance with the provisions of said trust deed.

VII.

That the said $2,000.00 charge was made, fixed, allowed and paid (if paid) without the consent, authority or knowledge of your orator, and the only suit which the trustee or the beneficiary under said trust deed is or purports to be authorized by said trust deed to defend at the expense of the trust or trustor is "to defend any suit to protect the title" of the property conveyed by the trust deed, and no such suit has at any time been brought. Your orator is, therefore, advised and does charge that the defendants have not, nor has any of them, any right under said trust deed, but if right they may have and whatever else it may be, the said charge of $2,000.00 is illegal and without color of right or authority.

VIII.

That notwithstanding the premises and the want of right or valid claim upon your orator or its said land under said note and deed of trust, the defendant, Mortgage Corporation of America, is still claiming the said sum of $15,729.37, or more, of your orator on account of said $12,500.00 note, and said defendant and said Title Guarantee and Trust Company threaten to enforce said unlawful claim by a sale of your orator's said property under said trust deed and your orator charges that unless restrained from so doing by this court, the said defendants will proceed to sell said land and buildings thereon, to the irreparable injury of your orator, as shown in the aforesaid amended bill.

IX.

That your orator, protesting that your orator is not indebted to the defendants, or any of them, at law or in equity, on account of said $12,500.00 note and that they have not, nor has any of them, any rights or valid claims at law or in equity against your orator upon or under or by reason of said note and deed of trust, nevertheless is willing and offers to do and abide whatever justice and equity may require of your orator in the premises.

WHEREFORE, your orator prays that the defendants be required to make answer to this amended and supplemental bill, but not under oath, answer under oath being expressly waived, and that your orator have all necessary and proper process and orders hereon.

That it be adjudged and decreed by your Honors that your orator is not indebted to the defendant, Mortgage Corporation of America, in the sum of $12,500.00 or the

sum of $15,729.37, or any other amount or sum whatever and that the said defendants have no rights against your orator under the deed of trust hereinbefore mentioned.

That the defendants, Mortgage Corporation of America, and Title Guarantee and Trust Company, and each of them, their officers, agents, servants employed and all persons acting for or under them, or either of them, be inhibited, restrained, and enjoined from prosecuting any foreclosure proceedings whatsoever on said deed of trust and from asserting against your orator any right or claim thereunder. That your orator have judgment against the defendants for your orator's costs in its behalf expended, including reasonable counsel fees, and that your orator may have all other and further proper process and orders and all further, fuller and general relief proper in the premises as the nature of your orator's cause may required or admit of and as may be equitable in the premises; and your orator as in duty bound ever prays.

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC

By COUNSEL.

Ceasar A. Roberts
Maynard F. Stiles,
Solicitors for Complainant.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

R. E. CLAPP, being duly sworn, does say:

That he is the managing director of the complainant corporation; that he has read the foregoing Amended and Supplemental Bill of Complaint and knows the con-

tents thereof; that the matters and claims therein averred are true to the best of affiant's knowledge and belief, and that he makes this verification on behalf of said corporation as the agent thereof most familiar with the matters in said Amended and Supplemental Bill set forth.

R. E. CLAPP.

Subscribed and sworn before me this 25th day of April, 1927.

(SEAL) MABEL C. KIRKSEY,

Notary Public in and for said County and State.

My commission expires June 22nd, 1927.

(Endorsed): Filed May 2, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

AFFIDAVIT

S. S. SMITH

STATE OF CALIFORNIA,

County of Los Angeles—ss.

S. S. SMITH, being duly sworn, doth say:

That he is and during the year 1924 and ever since that time has been the vice-president of Paramount Motors Corporation of the Pacific, the complainant in the above entitled cause, and as such vice-president executed in the name and on behalf of said corporation the notes for $12,500.00 and $4,500.00 and the deeds of trust securing same dated December 1, 1924, payable to H. E. Seaton, which are involved in the above entitled suit; that at the time of executing said notes and deeds of trust affiant did not meet nor have direct dealings with said Seaton, but had been informed and believed that he was a capitalist or money-lender who would supply the money requisite to finance the building operations to be carried

on the land of said Paramount Motors Corporation of the Pacific, and so supposed until later, and during the pendency of this suit, it was stated by Theron Walker that said Seaton was the agent and nominee of the said Walker in said transaction.

That affiant had no other knowledge concerning the said Seaton until the said Walker was examined as a witness in behalf of the defendants in said cause on the 8th day of April current, at which time he stated that said H. E. Seaton was employed at Bullock's Department Store in the City of Los Angeles; whereupon shortly thereafter, affiant interviewed said H. E. Seaton at said Bullock's Department Store, and was told by said Seaton that he, the said Seaton, was employed as manager in said department store and had been so employed for many years and was a resident of the City of Los Angeles in the year 1924 and many years therebefore and has since been; that he was the only H. E. Seaton employed at Bullock's Department Store and the only H. E. Seaton of whom he had any knowledge or intimation living in Los Angeles County during the period aforesaid or at any other time; that he was not the agent of Theron Walker or the Theron Walker Engineering and Construction Company in 1924 or at any other time; that he had never executed any assignment or other transfer of any note for $12,500.00 or $4,500.00 or any deed of trust or any note for any amount made by the Paramount Motors Corporation of the Pacific to him, the said H. E. Seaton, or in his name, and had never authorized any such assignment or transfer or purported assignment or transfer in his, the said Seaton's, name to be made to any person, and had not authorized the said Walker or any

other person to take any action in his name concerning any such notes or deeds of trust.

That affiant has lately been informed at Bullock's Department Store that shortly after the above mentioned interview with said H. E. Seaton, the said Seaton had been sent to New York on business, and said Seaton has not yet returned and is not now in the City of Los Angeles.

And further affiant sayeth not.

S. S. SMITH.

Subscribed and sworn before me this 25th day of April, 1927.

(SEAL) DOROTHA C. FEWTRELL,

Notary Public in and for said County and State.

My commission expires.....

(Endorsed): Filed May 2, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

AFFIDAVIT OF THERON WALKER IN OPPOSITION TO APPLICATION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL

STATE OF CALIFORNIA,

County of Los Angeles—ss.

Theron Walker being sworn states: That he was during all the times hereinafter mentioned doing business under the name of Theron Walker Engineering & Construction Co. That, as related in the Amended Bill and heretofore stated in open Court by affiant there was executed by the Paramount Motors Corporation of the Pacific a promissory note in the sum of Twelve Thou-

sand Five Hundred ($12,500.00) Dollars, dated December 1st, 1924, payable to the order of one, H. E. Seaton. That said H. E. Seaton was a friend of affiants of long standing, to-wit: for a period of over seven (7) years.

That affiant prior to the time of having said paper executed in favor of said H. E. Seaton had requested of said H. E. Seaton the right to use his name as a dummy or nominee or agent, and said H. E. Seaton had consented to such use.

That affiant informed R. E. Clapp that said H. E. Seaton was to act as a dummy, nominee or agent in said capacity, the said R. E. Clapp being the only person with whom affiant ever delt in connection with the execution of said paper, and further stated that he would finance the erection of the building himself perhaps with the aid of H. E. Seaton and other persons.

That after the execution and delivery to affiant of the Twelve Thousand Five Hundred ($12,500.00) Dollars trust deed note and trust deed, the said H. E. Seaton called at the office of affiant and duly signed and executed the endorsement and assignment appearing on the reverse side of the said note, transferring and assigning the same to affiant doing business as the Theron Walker Engineering & Construction Co.

That affiant never met S. S. Smith in connection with said transaction except on one occasion, and on that occasion no discussion whatsoever was had with reference to the said H. E. Seaton supplying any money or financing in any way the proposed erection of a factory building. That after the execution of said paper and the endorsement thereof by said H. E. Seaton to affiant doing business as aforesaid, and prior to the sale thereof to the Mortgage Corporation of America, affiant together

with said H. E. Seaton visited the office of the Mortgage Corporation of America and at the request of M. G. Kreinman, President of said corporation, said H. E. Seaton stated that the endorsement of signature upon said promissory note was his and had been placed there by him.

THERON WALKER.

Subscribed and sworn to before me this 27th day of April, 1927.

(SEAL) MAE CHAFFEY,

Notary Public in and for the County of Los Angeles, State of California.

(Endorsed): Filed May 3, 1927. R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

AFFIDAVIT OF H. E. SEATON IN OPPOSITION TO APPLICATION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL

STATE OF CALIFORNIA,
County of Los Angeles—ss.

H. E. Seaton being sworn states: That he is now and for a long time past has been a resident of the City of Los Angeles, County of Los Angeles, State of California. That he has known Theron Walker for approximately seven years. That the nature of their acquaintance and relationship has been both of a social and a business nature. That affiant recalls that heretofore and during the month of December, 1924, to-wit: on or about the 4th day of December of said year the said Theron Walker

at his office in the Spreckles Building, in the City of Los Angeles, presented to affiant two (2) promissory notes, one in the sum of Twelve Thousand Five-Hundred ($12,-500.00) Dollars, and one in the sum of Four Thousand Five Hundred ($4,500.00) Dollars, both of said notes being payable to affiant. That affiant had no interest financially or otherwise, except as a friend and nominee of Theron Walker and that at the request of said Theron Walker endorsed each of said notes on the reverse side thereof as follows:

"Los Angeles, Calif. December 4th, 1924.

For value received I do hereby transfer and assign to the Theron Walker Engineering and Construction Co., the within note without recourse to me together with all rights accrued or to accrue under this deed of trust, securing the same so far as the same relate to this note.

H. E. Seaton." HES.

That affiant then and there redelivered said promissory notes to the said Theron Walker and has not seen either of said notes since said time. That affiant does not recall at any time having had possession of or having seen the trust deeds referred to in said notes. That affiant is employed at Bullock's, a department store in the City of Los Angeles, in the capacity of superintendent of manufacturing with an office on the eighth floor, south Hill Street building in the City of Los Angeles. That heretofore on or about the 10th day of April, 1927, some person came to the office of affiant and made inquiry for him. That affiant saw said person whose name he now does not recall. That affiant saw said person in his office and that said person then and there stated he was connected with, or then mentioned the name of the Paramount Motors Corporation and asked affiant with refer-

ence to his signature or endorsement upon a certain Twelve Thousand Five Hundred ($12,500.00) Dollar promissory note. That affiant then and there stated and told said person that he did not recall having had any part in any such transaction as related to him by said person. That, substantially was the whole of the conversation.

That since said time said person or some person in his behalf wrote a letter to affiant enclosing a proposed form of Affidavit, which said form of Affidavit refreshed the recollection of affiant and he now recalls the transaction with reference to placing his signature below the endorsement on the reverse side of said notes as hereinbefore set forth.

H. E. SEATON.

Subscribed and sworn to before me this 3 day of May, 1927.

(SEAL) SAMUEL C. COHN,

Notary Public in and for said County of Los Angeles, State of California.

(Endorsed): Filed May 3, 1927. R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

STATE OF CALIFORNIA,

County of Los Angeles—ss.

S. S. SMITH, being duly sworn, deposes and says on oath:

That for several years he has been interested as an investor for himself personally and for family members to the amount of about Seven Thousand ($7,000.00) in the Paramount Motors Corporation of the Pacific, and

that his efforts have been to protect the corporation against the payment of unjust amounts for which no service or thing of value was returned;

That affiant is familiar with the litigation and was present at a recent hearing in this court and never, until the affidavit of Theron Walker was read, did this affiant understand or know that H. E. Seaton was merely a nominee of Walker; that on the seventh and eighth days of April, 1927, affiant was present in court and heard Theron Walker testify as to H. E. Seaton; that on the tenth day of April, 1927, affiant, after a conversation with other officers, set out to hunt up Mr. Seaton and make inquiry of him, and that inquiry was made to determine the facts; that upon the tenth day of April, 1927, affiant hunted up Mr. Seaton and the following conversation was had as nearly as possible in words and figures then used.

Questions by affiant and answers by Seaton.

After introducing myself (S. S. Smith), and stating my position with the Paramount Motors Corporation of the Pacific:

Question: Do you know anything about the Paramount Motors Corporation of the Pacific?

Answer: Is it a local concern?

Reply: Yes.

Answer: I do not.

Question: Do you know Theron Walker or the Theron Walker Engineering and Construction Company?

Answer: No.

Question: Did you during the month of November, 1924, authorize said Theron Walker to have notes made to you by the Paramount Motors Corporation of the Pacific in the sum of $12,500 and $4,500, and later assign

those notes to the said Theron Walker Engineering and Construction Company?

Answer: Had that been done and the notes were good, I would not be here.

Question: Then I take it you did not?

Answer: No.

Question: Are you, Mr. Seaton, or were you during the month of November 1924, a money lender?

Answer: No.

On May 4th, 1927, in company with Attorney Chas. L. Farr, I again interviewed Mr. Seaton, and he said he had refreshed his memory and that he did assign some such papers to the said Theron Walker Engineering and Construction Company.

Question: Then you do know said Theron Walker?

Answer: You have read my affidavit, have you not?

That after reading the affidavit of said H. E. Seaton to the effect that his memory had been refreshed and he now remembers that he assigned notes, affiant made a visit to Seaton and that said Seaton then affirmed that he did assign notes but did not state the amounts and merely spoke of them as some notes and seemed to have no distinct memory of the transaction and that it is to be noted that the affidavit made by said Seaton is made and sworn to before the attorney for the defendant corporation, Samuel Cohen;

That affiant is fully convinced that the transaction testified to by said Seaton did not occur in fact but has been revived in the interests of the defendant and affiant believes that, as an officer of this corporation, the said Seaton should be summoned before the court and there, under oath, give his statement and allow the signature on the back of said notes to be compared with his signa-

ture to determine the fact and the date when the said Seaton assigned said notes. Signature to be determined by parties qualified to determine such matters.

S. S. SMITH.

Subscribed and sworn before me this 6th day of May, 1927.

(SEAL) DOROTHA C. FEWTRELL,
Notary Public in and for said County and State of California.

(Endorsed): Filed May 6, 1927. R. S. Zimmerman, Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

STATE OF CALIFORNIA,
County of Los Angeles—ss.

L. W. COFFEE, being duly sworn, deposes and says on oath:

That he is and since the organization of the Paramount Motors Corporation of the Pacific has been interested to the extent of an investment of about Ten Thousand ($10,000.00) Dollars in the property of which the corporation is a beneficiary, and as an officer of said corporation has given as close attention to its affairs as was practical in connection with his other business;

That at all times affiant knew from the conversation of Theron Walker that Theron Walker relied upon one H. E. Seaton as a financier and capitalist to finance the building of the factory; that never at any time, either in writing or in conversation, did the said Walker ever intimate that the said Seaton was merely a nominee, but when the said Walker came to the complainant corporation and stated that Mr. Seaton could not furnish the

money but he had found someone else to do it, he, the said Walker, asked that new papers be made and this affiant, as an officer, together with Mr. Clapp and Mr. Smith and other officers, said that it would be inconvenient to draw new papers and appoint a new trustee and go to large additional expense, but have Mr. Seaton endorse the notes to Walker and that was agreed upon and Walker said that he would procure Seaton to endorse said notes; that at all times during this controversy, until Walker himself by his affidavit declared that Seaton was a nominee, this affiant has believed that Seaton was actually interested in the matter as a capitalist and that not until the said Walker testified on the stand did this affiant, who was present at the hearing, have any intimation that Seaton was a mere name and/or conduit through which Walker was acting.

L. W. COFFEE.

Subscribed and sworn before me this 6th day of May, 1927.

(SEAL) DOROTHA C. FEWTRELL,
Notary Public in and for said County and State of California.

(Endorsed): Filed May 6, 1927. R. S. Zimmerman, Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

STATE OF CALIFORNIA,
County of Los Angeles—ss.

R. E. CLAPP, being duly sworn, deposes and says on oath:

That his investment in Paramount Motors Corporation of the Pacific, together with those whom he represents,

and its affairs directly and indirectly, is in excess of One Hundred Thousand ($100,000.00) Dollars, and it is because of the large amount of money ventured in the corporation and its buildings that this affiant, as an officer of the corporation, has felt it his duty to guard the corporation against the payment of unearned moneys and against the payment of sums for which the corporation has received no value;

That at all times and during all negotiations Walker was insistent that H. E. Seaton was an actual investor and capitalist and never at any time in writing or by intimation did affiant understand that Seaton was not actually interested until affiant read Walker's affidavit in which Walker declared that Seaton was a mere nominee, and that after hearing Walker's testimony on the stand as to Seaton, affiant became convinced and still is convinced that the transaction with Mr. Seaton was never had until after the close of this hearing;

That affiant discussed the matter with Vice-President S. S. Smith and upon affiant stating that it became the duty to investigate the matter, S. S. Smith, as the vice-president, left the offices of the corporation with the express purpose of interviewing the said H. E. Seaton to learn the facts as they existed; that this was about the tenth day of April, 1927, and that the investigation of the said Smith has been reported to this court in the form of affidavits;

That never at any time was there a suggestion on the part of the affiant that this suit was for delay; that this affiant, as an officer of said corporation, is willing and able and ready to pay any sum justly found due; and that this corporation in good faith sold and delivered to Mr. Walker $11,965.00 in value of collectable accounts

and that said Walker has collected on the same and has never offered to turn back the same or never claimed they were collateral securities; that the affidavit of said Walker that he had ever told affiant that Seaton was a mere nominee or a nominally interested party is entirely without any foundation in fact.

R. E. CLAPP.

Subscribed and sworn before me this 6th day of May, 1927.

(SEAL) DOROTHA C. FEWTRELL,
Notary Public in and for said County and State of California.

(Endorsed): Filed May 6, 1927. R. S. Zimmerman, Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

DECREE

This cause came regularly on to be heard before the Court, Honorable Edward J. Henning, Judge thereof presiding, on the 27th day of April, 1927, upon the complainant's amended bill of complaint and answer thereto filed by the defendants, Title Guarantee & Trust Company, a corporation, and Mortgage Corporation of America, a corporation, said complainant appearing by Messrs. Caesar A. Roberts and Maynard F. Stiles, its solicitors and said defendants appearing by Messrs. Clore Warne, Samuel C. Cohn and James C. Mack, their solicitors, and evidence both oral and documentary having been introduced on behalf of plaintiff and said defendants, and said cause having been submitted to the Court for its consideration and decision, and the court having considered the

evidence, the arguments and briefs of solicitors for the respective parties, now therefore,

The Court hereby finds that the plaintiff has not maintained the material allegations of its amended bill by a preponderance of evidence, and specifically finds that any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment; and therefore,

IT IS ORDERED, ADJUDGED AND DECREED, that complainant take nothing by his amended bill of complaint herein, and that judgment be and is for and in favor of the defendants, Title Guarantee & Trust Company, a corporation and Mortgage Corporation of America, a corporation, and against the complainant, Paramount Motors Corporation of the Pacific, a corporation, and for said defendants' costs herein incurred, taxed in the sum of $134.90.

Dated this 7th day of July, 1927.

EDWARD J. HENNING.

Decree entered and recorded July 7, 1927. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. (Endorsed): Filed July 7, 1927. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. Docketed July 7, 1927.

[Title of Court and Cause]

No. J 85 H

IN EQUITY

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS

To the Honorable Judges of said Court:

Comes now the complainant above named and conceiving itself to be aggrieved by the final decree entered

herein on the seventh day of July, 1927, and by sundry rulings, orders and actions of this Court in the proceedings in said cause, respectfully shows that said decree and said rulings are, as complainant is advised, erroneous, to the great prejudice of complainant, for the reasons and in the particulars set forth in the following:

ASSIGNMENT OF ERRORS, committed by said District Court, viz:

First: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the paper called "Owner's Offset Statement" (defendants' Exhibit "C") signed by Paramount Motors Corporation of the Pacific, by Chas. H. Norton, Sec'y., addressed to Union Bank & Trust Company of Los Angeles, at the latter's request, stating that said Paramount Motors Corporation of the Pacific is the maker of the promissory note dated December 1st, 1924, in favor of H. E. Seaton and secured by a deed of trust upon a twenty-acre tract of land, describing it; that said maker is the owner of said premises; that the unpaid balance of said note is $12,500; that the interest on said note is unpaid; that said maker has no offsets, claims nor defense to said note, and that said note and trust deed have been assigned and the new owner's name and address is Mortgage Corporation of America, 310 Union Bank Building, Los Angeles, California; which paper was offered for the purpose of showing that the complainant was estopped to claim any credit upon or offset to or defense against said note.

The Court erred in admitting said paper in evidence, it appearing upon its face to be addressed to a stranger to the transaction, the Union Bank & Trust Company, and not to defendant, Mortgage Corporation of America,

or to anyone under whom it claims, it further appearing from the face of said paper that the Mortgage Corporation had already acquired said note, and there being no claim of estoppel set up in the answer nor anything alleged therein as a foundation for such claim.

Second: The Court erred in over-ruling complainant's motion to strike out the above mentioned "Owner's Offset Statement," defendants' witness having testified that the Mortgage Corporation had purchased the $12,500 note before it received said statement.

Third: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the Notice of Completion, "Defendants' Exhibit E," being an affidavit of the managing director of complainant that the building on said twenty-acre tract of land, contracted to be built by Theron Walker Engineering & Construction Company, was completed January 31st, 1925; the said paper and fact or date of completion being immaterial to any issue in the case.

Fourth: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of complainant, the so-called "Stop Order," a paper purporting to be signed by one F. S. Lack, dated January 18th, 1926, addressed to Bank of America, ordering said Bank not to pay out any funds for improvements in respect to Trust 243 (being the trust a claim against the "improvement fund" of which had been assigned) unless such payment shall have been approved by said Lack, and attempting to authorize the payment of certain small items to sundry persons; the said paper being incompetent and immaterial and irrelevant to any issue in the case. It was not shown that Lack had any authority in the premises or that any action was taken on the order.

Fifth: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of complainant, the paper entitled "Paramount Motors Project" on the letter-head of Theron Walker Engineering & Construction Company, undated, addressed to no one and signed by no one, purporting to state the purposes of Paramount Motors Corporation of the Pacific and the uses to which it proposed to put certain lands; stating that the twenty-acre tract had been put under a mortgage of $17,000 to build a factory, which had been leased to the Porter Automobile Body Manufacturing Company for several years; setting out the making of the notes and deeds of trust for $12,500 and $4,500, and arrangements for paying same; to which paper is attached an unaddressed and unsigned memorandum on the Paramount Motors Corporation letter-head appearing to show amount of loan desired, location and values of lands, purpose of building, lease of same for $300.00 per month, plan of payment of loan, etc., said two papers being "Defendants' Exhibit K." Said papers are incompetent as evidence and irrelevant and immaterial to any issue in the case.

Sixth: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of complainant, the paper purporting to be a lease dated December 4th, 1924, from Paramount Motors Corporation of the Pacific to Gilbert E. Porter of the said twenty-acre tract, the assignment of the rents to be derived thereunder by the lessor to Theron Walker Engineering & Construction Company to be applied upon said trust deed notes, and the two papers stating the financial responsibility of L. W. Coffee and R. E. Clapp, said four papers being "Defendants' Exhibit L"; the said papers

and each of them being immaterial to any issue in the case.

Seventh: The Court erred in refusing leave to complainant to file the amended and supplemental bill tendered to the court and in refusing to entertain said bill.

Eighth: The Court erred in finding and decreeing that the complainant had "not maintained the material allegations of its amended bill by a preponderance of the evidence."

Ninth: The Court erred in finding "that any assignment made by the plaintiff to Theron Walker was assignment as collateral only, and not as payment."

Tenth: If the assignment of the $11,965.00 demand was "as collateral," the Court erred in leaving the defendants free to sell complainant's land for the full amount of the $12,500.00 note without first resorting to a sale of the collateral.

Eleventh: The Court erred in permitting the defendants to go on with sale of complainant's land for the full amount of said $12,500.00 note without surrendering or in any manner accounting for the $11,965.00 demand still held by them, whether as collateral or otherwise.

Twelfth: The Court erred in permitting the defendants to proceed with the sale of complainant's land to enforce payment, not only of the full amount of said $12,500.00 note, without deduction of or accounting for the said $11,965.00, but for the further sum of $2,579.43, of which the sum of $2,000.00 is for counsel fees in this suit, added by the trustee without complainant's consent and without authority of law therefor.

Thirteenth: The Court erred in decreeing in favor of the defendants and in denying to complainant the relief prayed for or any relief.

Fourteenth: The Court committed other errors to complainant's prejudice apparent upon the face of the record.

WHEREFORE, your petitioner, the complainant aforesaid, prays that an appeal be awarded to complainant to bring the record of said decree and proceedings before the United States Circuit Court of Appeals for the Ninth Judicial Circuit for review; that a transcript of so much of the record of said cause as was not sent up on former appeals be transmitted to said Circuit Court of Appeals, at San Francisco, California, and that said decree be by said appellate court reviewed and reversed.

And your petitioner will ever pray.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC
By Counsel.
MAYNARD F. STILES,
CAESAR A. ROBERTS,
Counsel for Petitioner.

(Endorsed): Filed Sep. 13, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

ORDER AWARDING APPEAL

This day came the complainant, by its counsel, and presented to the Court its petition for appeal from the final decree entered herein on the seventh day of July, 1927, together with an assignment of errors alleged to have been committd by the Court in and by said decree and the proceedings herein;

In consideration whereof it is ordered that an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby

awarded to the complainant as prayed for in said petition, and the Clerk is directed to transmit to said Circuit Court of Appeals, at San Francisco, a transcript of so much of the record of said cause as may be required; bond upon said appeal to be in the penal sum of $250.00 conditioned according to law.

EDWARD J. HENNING, *District Judge.*

Dated, September 13th, 1927.

(Endorsed): Filed Sep. 13, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

IN EQUITY

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS, That Paramount Motors Corporation of the Pacific, a corporation, Complainant in the above entitled cause, as principal, and Pacific Indemnity Company, a corporation, as surety, are held and firmly bound unto Title Guarantee & Trust Company, a corporation, Mortgage Corporation of America, a corporation, and Theron Walker, doing business as Theron Walker Engineering and Construction Company, Defendants in the said cause, in the penal sum of TWO HUNDRED FIFTY ($250.00) DOLLARS lawful moneys of the United States, to the payment of which to the said Defendants the said obligors bond themselves and their several successors jointly and severally firmly by these presents; but upon this condition:

WHEREAS, a decree was rendered and entered in the above entitled cause on the 7th day of July, 1927, against the said Complainant and in favor of said Defendants, to review which decree said Complaint has procured an

appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and a citation to the said Defendants admonishing them to appear before said last named court, at San Francisco, California, on a day named in said citation;

NOW, if the said Paramount Motors Corporation of the Pacific, Complainant and Appellant, shall prosecute its said appeal to effect; or shall pay or cause to be paid all costs that may be awarded against it, should said Appellant fail to make good its plea, then this obligation to be void: otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, said Paramount Motors Corporation of the Pacific and said Pacific Indemnity Company have respectively caused these presents to be executed in their respective corporate names and their respective corporate seals to be hereto affixed by their respective authorized Managing Director and Attorney in Fact, this 14th day of September, 1927.

(Corporate Seal)

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC

By R. E. CLAPP

Its Authorized Managing Director

(Corporate Seal)

PACIFIC INDEMNITY COMPANY

By M. F. DOYLE

Its Attorney in Fact.

Approved Sept. 16, 1927.

WM. P. JAMES,

District Judge.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

On this 14th day of September in the year one thousand nine hundred and 27, before me, NORMA E. WALKER, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared M. F. DOYLE, known to me to be the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said M. F. DOYLE acknowledged to me that he subscribed his name of PACIFIC INDEMNITY COMPANY, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Notarial Seal) NORMA E. WALKER,

Notary Public in and for Los Angeles County, State of California.

My Commission expires March 31, 1930.

(Endorsed): Filed Sep. 16, 1927. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J-85-H

IN EQUITY

STATEMENT OF THE EVIDENCE

Be it remembered that upon the hearing of this cause the complainant, to maintain the issues on its part, produced the following oral and documentary evidence, to-wit:

(Testimony of R. E. Clapp).

R. E. Clapp, being sworn as a witness, testified in substance as follows:

That he was managing director of the complainant corporation in 1924 to the present time and during the occurrence of all matters in controversy in this suit. The plaintiff prior to November 1924, owned the twenty-acre tract of land described in the Bill and after negotiations to that end, entered into a contract with the Theron Walker Engineering and Construction Company for the building of a factory building upon said land in accordance with plans and specifications furnished by Walker, for a total amount of $17,000.00.

Complainant introduced in evidence the "Builder's Contract" which is designated as plaintiff's "Exhibit No. 1" and copy of the "Resolution of the Board of Directors" of complainant corporation, dated December 3, 1924, authorizing the contract, which is marked plaintiff's "Exhibit No. 2".

It was here stipulated by counsel that the complainant executed a promissory note for Twelve Thousand Five Hundred ($12,500.00) Dollars, and one for Four Thousand Five Hundred ($4,500.00) Dollars as a second note pursuant to the terms of the contract, as payment to Walker, and that complainant received therefor no money or any other consideration but the "Building Contract."

Witness continues: In the first part of December, 1924, in witness' office, 406 Grosse Building, Los Angeles, A. C. Norell, secretary of complainant corporation being present, Walker stated to witness that a man of the name of H. E. Seaton was to furnish to him the Seventeen Thousand ($17,000.00) Dollars to erect the building on complainant's land, but he found that Seaton was unable

(Testimony of R. E. Clapp).

to do so and witness suggested that as the notes had been executed, to avoid the trouble of calling the directors together again Walker might have Seaton assign the notes to whoever would furnish the money, and Walker said he would do so. An assignment of securities in the sum of Eleven Thousand Nine Hundred Sixty-Five ($11,965.00) Dollars, dated November 29, 1924, was made to Walker in the early part of December, 1924, and was delivered to Walker by witness, who has not seen the paper since but understands it was placed in the Bank of America. There was paid to the Mortgage Corporation of America the sum of Seven Hundred Fifty ($750.00) Dollars in three (3) payments, the first one about April, 1925, another about three (3) months later, and the third about three (3) months still later. Mr. Kreinman, president of the Mortgage Corporation of America, was present. He said that these quarterly interest payments on the Twelve Thousand Five Hundred ($12,500.00) Dollar note were due and witness told him the plaintiff would not pay them but witness would. Kreinman said he wanted to keep the thing in good standing and would like to have witness pay the premium on the insurance policy. Witness told him that one of the men in witness' office had applied for insurance on the building and witness did not wish to pay twice. Kreinman said he owed Walker some more money and he wanted to settle these accounts and settle with witness. The factory building was completed in March, 1925, and this conversation was in April or May, 1925. About a month or two later at Kreinman's office in the Union Bank Building, Los Angeles, said A. C. Norell being present, Kreinman again brought up the subject of insurance and witness told him

(Testimony of R. E. Clapp).

he had not been able to get the directors together, but as soon as he could do so he would and would abide by what they said. Kreinman said he was still indebted to Walker and wanted to clear up this insurance matter and settle with him.

Complainant introduced in evidence a copy of an assignment from plaintiff to Theron Walker Engineering and Construction Company and a claim for Eleven Thousand Nine Hundred Sixty-Five ($11,965.00) Dollars which is designated plaintiff's "Exhibit No. 4"; a copy of the Articles of Incorporation of Paramount Motors Corporation of the Pacific (the complainant) which is designated plaintiff's "Exhibit No. 5"; and an amendment thereto designated as plaintiff's "Exhibit No. 6"; a copy of a trust deed from complainant to Title Guarantee and Trust Company, made to secure the note of Twelve Thousand Five Hundred ($12,500.00) Dollars, designated plaintiff's "Exhibit No. 7"; a copy of trust deed between the same parties to secure the note of Four Thousand Five Hundred ($4,500.00) Dollars designated as plaintiff's "Exhibit No. 8."

It was stipulated that notice of the institution of foreclosure proceedings on the Twelve Thousand Five Hundred ($12,500.00) Dollar trust deed was given in the manner provided by its terms.

CROSS-EXAMINATION:

Witness is the managing director of Paramount Motors Corporation of the Pacific; is not paid a salary, and never has been so paid; is interested in the deal as a stockholder, but does not know the amount of stock he holds. The corporation is capitalized at Five Million ($5,000,000.00) Dollars and the permit from the Cor-

(Testimony of R. E. Clapp).

poration Commissioner of California for the issuance of One Million Two Hundred Fifty Thousand ($1,250,000.00) Dollars in stock was secured by said corporation. Mr. Norell was never a stockholder but acted as secretary or assistant secretary for a short time. The Board of Directors of said corporation consists of witness, S. S. Smith, M. A. Baird, L. W. Coffee, Clarence Barker, Wm. Akins and N. E. Bliss. The last meeting held by them was in the current week. No action was taken with reference to this litigation. The only assignment of interests of the fee of this real property by said corporation was the trust deed referred to. Witness has not received any money on account of the project whereby this building was built, nor from the sale of any lots.

Q. "Did you receive any money at all for any services rendered, or for any purpose whatsoever in connection with the project organized by the Paramount Motors Corporation of the Pacific, either as salary or otherwise?"

A. "At one time I paid out certain monies, I believe $4,300.00, during their stock campaign, that is, when they were selling stock. I was never selling stock. And they put me on what they called a salary until that was repaid in stock—$4,000.00, I believe. I paid the money out once, and finally they put it into a salary form."

Witness does not recall that he has any contract with the corporation whereby he is to be paid for his services as managing director. It might have been part of the contract but it has been so many years he does not remember about it.

The conversation with Kreinman about payment of interest on the note was in April or May, as he recalls it, at witness' office, and he had a later conversation with

(Testimony of R. E. Clapp).

Kreinman at the latter's office and gave Kreinman witness' check for the interest or mailed it to him. The corporation had a place of business in witness' office and nowhere else.

Witness signed and swore to the Amended Bill in this cause in which it was alleged that in addition to the payment of Eleven Thousand Nine Hundred Sixty-Five ($11,965.00) Dollars to Walker, a payment was made to Mortgage Corporation of America of Seven Hundred Fifty ($750.00) Dollars in three (3) payments of Two Hundred Fifty ($250.00) Dollars each on quarterly interest claimed by defendant to be due and in arrears. That statement and witness' present statement are both true.

In the first instance, witness was asked in regards to the conversations he had with Mr. Kreinman and what took place there. That, he stated. That is the truth. "Subsequently, the corporation gave me credit for the payment of Seven Hundred Fifty ($750.00) Dollars, probably at the end of that year, so they could close their books; made it payable—well, I gave them a bill, that I had paid the Mortgage Corporation of America." That was about the end of the year. Witness had loaned the corporation Thirty Thousand ($30,000.00) Dollars, none of which had ever been paid back. The corporation did not pay the interest at the time but subsequently gave witness credit on their books for that amount, but has never yet paid it and still owes it to witness. The corporation gave witness credit for the Seven Hundred Fifty ($750.00) Dollars and in that way paid the interest. This payment by witness was made in April or May and build-

(Testimony of R. E. Clapp).

ing was finished about March 1st. As witness recalls—the payment was made after the building was finished.

Q. "I call your attention to the Builder's Contract. It is dated the 28th of November, 1924, and that the promissory note and the trust deed are dated the 1st day of December, 1924. You would say, then, that that was the orderly way that the matter proceeded, is that right?

A. "I would think so."

Q. "And this trust deed and note, together with another trust deed and note, were given to Mr. Walker, is that right?"

A. "You mean, made out payable to him for his benefit?"

Q. "I do not. They were handed to him."

A. "Physically handed to him?"

Q. "Yes. That was the consideration stipulated in the Builder's Contract that you had executed, is that right—that your corporation had executed?"

A. "That is true."

Walker stated at the time that Seaton was going to loan him the money—stated that two or three times. He did not tell witness who Seaton was, but stated he was a money lender and was going to lend Walker the money. Walker never stated that Seaton was a dummy or a nominee of himself, nor anything like it. He did not mention the use of a nominee or dummy at all. Seaton was to be the principal in the deal.

Counsel hands witness a copy of the writing dated November 29, 1924, signed S. S. Smith and N. E. Bliss, and is asked if he has ever seen the same before.

Witness presumes that the secretary gave it to him out

(Testimony of R. E. Clapp).

of the files and he gave it to counsel in the case but does not recall anything else about it.

Defendant introduces the paper in evidence as "Exhibit A." (This is a copy of document already in evidence, except the partial erasure of the word "when." Witness states that the word "when" has been obliterated.

Witness does not think that this assignment was delivered to Walker the same day that notes and deeds of trust were handed to him, but does not know, as Walker was in the office, perhaps, every day about that time and witness cannot say on what day he received the documents.

Counsel for the defendants offers in evidence what is purported to be a resolution of the Board of Directors of Paramount Motors Corporation of the Pacific authorizing the execution of the assignment of the Eleven Thousand Nine Hundred Sixty-five ($11,965.00) Dollars as the same appears on Pages 81 and 82 of the reporter's transcript of evidence filed in this case January 7, 1926. The material portion of said resolution reads as follows:

"Therefore be it resolved, that the officers, or any of them, of this corporation, are hereby authorized, directed and instructed to assign the aforementioned improvement fund in the amount of $11,965 to Theron Walker Engineering & Construction Company, to be credited, when and as paid out of improvement fund under Trust No. 243, Bank of America, as payment to that amount on loan of $17,000, therefrom."

Witness was present at the meeting of the directors on December 3, 1924, and recalls the passing of the resolution just offered in evidence. He does not believe that Walker was present, but he may have been. Charles

(Testimony of R. E. Clapp).

H. Norton was secretary of the corporation at that time.

Q. "Now then, I will show you what purports to be a prospectus and attached papers, one of them on your own letterhead, the whole of it being on the letterhead of the Theron Walker Engineering Company, called 'Paramount Motors Project,' and I will ask you to examine those papers and instruments, and ask you if you ever saw them before, and if so, when?"

Witness had seen them about December 3, 1924. He had signed one of them but does not recall seeing the one on the Walker letterhead.

Q. "Do you recall any conversation with Mr. Walker during any of this time, when you had a conversation, in which you said, 'As additional security for this $12,-500.00 note, and the $4,500.00 note, we will give you an assignment of a lease to Mr. Porter that we have on that premises. Do you remember such conversation?'"

A. "I remember stating that there was a man by the name of Porter that was contemplating leasing this building. In fact, it was to be put up for him, anticipating that he was going to operate it and buy it later on; and that a lease that he would enter into, if he had not already done so, would be assigned to them, or whatever rent would accrue under that, and would be assigned to them, and the moneys paid directly to him."

Q. As additional security for the $12,500.00 note and the $4,500.00 note; isn't that right?

A. That is not correct.

Q. Alright. Why was it to be assigned to him? What was said?

A. Well, the money could be paid direct by Mr. Porter to Mr. Walker or whoever his nominee might be.

(Testimony of R. E. Clapp).

Q. So the money was to be paid direct to Mr. Walker or his nominee for what purpose?

A. To apply as payment on the principal of these notes.

Q. When it was paid?

A. I imagine that is true. I don't see any other purpose.

Q. "Now, you assigned the proceeds under this lease to be applied when and as received on the payment of the principal of the $12,500.00 note and the $4,500.00 note, is that right?"

A. You mean the proceeds that might accrue—rental proceeds that might apply on the joint paper?

Q. Yes.

A. "The $17,000.00 is all I know about."

Q. "Now, is it a fact, or is it not a fact that this assignment was made at the same time and under the same conditions that the assignment that heretofore has been introduced in evidence was made?"

A. "They are different documents entirely, and dealing with two different steps entirely as an asset, and as to when they were made, or whether at the same day or hour, I do not know."

Q. "My question is, were they made under the same conditions, that is, to be credited when and as paid on the principal of the $17,000.00?"

A. "No, they are entirely two different steps."

Witness distinctly recalls conversation with Walker at this time in which they were specifically discussed as separate matters; does not recall the time, nor who else was present but thinks Mr. Norell was.

"Mr. Walker came on the scene because of the fact,

(Testimony of R. E. Clapp).

and as he was told by me, that a man by the name of Porter wanted a factory building, and that we were entitled to certain acreage. I say by 'we,' I mean the Paramount Motors Corporation, nothing personal about it—would build this by certain arrangements, practically for the benefit of Mr. Porter, and whoever he represented, and that he said that he could afford to pay, as I recall, $300 a month for this plant. And I mentioned before that he was to have an option on it finally at some future time, and pay for it with ten acres of the land, of the twenty acres, and own it. And that if he entered into this lease and leased the proposed building, the rentals could be used to pay off the encumbrances that would be placed against the proposed building; and that finally culminated into a fact, and he did enter into a lease. And what we considered—as I told Mr. Walker, as far as we knew it was all in good faith, and it was assigned for any rentals to be paid directly to Mr. Walker rather than to go through this corporation, because it behooved me to handle most of their affairs, and I didn't care to be burdened with the thing. Now, that is the Porter transaction, as I recall it."

Q. "Now, as a matter of fact, didn't you have a conversation with Mr. Walker in which he said that additional security was going to be required—that he could mortgage this paper?"

A. "He said to put a building up and finance it he must have an occupant."

Q. "All right. And he had to have additional security?"

A. "It had nothing to do with the additional security."

Q. "Did he say that, or didn't he?"

(Testimony of R. E. Clapp).

A. "Not to me, no."

Q. "Well, did you hear him say that?"

A. "No. It had nothing to do with additional security. The building on twenty acres was to be hypothecated. That was the security, and a lessee of the building, which he had."

Q. "That was to be the security?"

A. "That was to be the whole thing. It was the whole thing at the time when we first started it."

Q. "There was an assignment of this lease and the receipts under it to Mr. Walker, wasn't there?"

A. "There was, certainly."

Q. "All right. And was that as the security?"

A. "That was the security. That was the original transaction."

Q. "What did you execute the trust deed for?"

A. "I just stated, to secure a note against the building, and the twenty acres of the land."

Q. "Well, if it was secured that way, what was the purpose of executing an assignment of——

A. "We wanted a tenant in the building. We didn't want to build a building with no tenant."

Q. "Now, didn't you tell him that you would assign him this lease, and that you would make these other assignments so that he could more readily sell this paper that he had? Just state, is it a fact that you told him that, or isn't it a fact?"

A. "I did not mention to Mr. Walker anything about these assignments. I did state to him that this lease would be assigned to him, because it was the foundation of the whole transaction."

Q. "Now then, let me ask you—you can answer this

(Testimony of R. E. Clapp).

question yes or no—did you tell Mr. Walker that you would assign him the proceeds and rentals under this lease so as to make the paper—the $12,500.00 paper and the $4,500.00 paper more salable?"

A. "Why, the Porter lease—that the Porter lease, yes, that Porter lease would be assigned to him so he would have a tenant in the building, so he could finance it, yes, that is a fact."

Witness had no conversation with Walker with reference to the transfer of the assignment of the other interest at which he stated that he would make this other assignment so as to make the paper more salable. Witness recalls that at the time of the transfer of the $12,-500.00 note to Mortgage Corporation of America, Walker came over to his office and stated that his man Seaton had fallen down on him and would not "come through" with the money to put this building up under his contract and he was going to sell it to some Jews, or that they were going to finance it, and that he was going to transfer this paper to them—that "he was going to secure some money from some Jews to finance either him or the building, or his contract, I do not recall which, and he was going to transfer the paper to them." He might have said "sell" or "transfer," I do not remember which.

Counsel shows witness what purports to be Owner's Offset Statement, dated Los Angeles, California, December 18, 1924, signed by Paramount Motors Corporation of the Pacific, Chas. H. Norton, Secy. This is the first time witness has ever seen it, but he had heard about it "around that time". Mr. Norton asked him about it and witness told him he knew nothing about it.

(Testimony of R. E. Clapp).

Defendant offers the paper in evidence as defendant's "Exhibit C"; "for the purpose of showing that this corporation (meaning plaintiff), is estopped, and that after they had made this alleged payment they said they still owed $12,500.00 on this paper."

To the admission of which paper in evidence the complainant, by counsel, objected as being irrelevant and immaterial, not tending in any way to constitute an estoppel against complainant, and not being admissible under the pleadings, no claim of estoppel being set up or pleaded in the Answer, or otherwise; but the Court overruled said objection and admitted said paper to be received and considered as evidence in the case; to which ruling of the Court Complainant by counsel then and there excepted.

Witness never saw the said "Offset Statement" until today. Mr. Norton called over one time quite a while later and asked witness what it all meant. Witness said, "I don't know anything about it." Witness does not remember that Mr. Norton called him up and said that Mortgage Corporation of America wanted an offset statement; does not think the question ever came up. He wanted to know about this offset statement and I told him that I didn't know any more about it that he did. Does not know what was the unpaid balance of the $12,500.00 note on December 18, 1924; unquestionably, it was less than $12,500.00 because the plaintiff corporation had transferred to Mr. Walker, as payment on the $17,000.00 trust deed notes, an account for a good many thousand dollars; that is the assignment in evidence. If Mr. Norton stated that the unpaid balance was $12,-500.00 on December 18, 1924, witness has no idea what he had in mind or did. He has no recollection of having

(Testimony of R. E. Clapp).

a conversation with Walker about the offset statement about the time it was executed; the matter was never brought to witness' attention.

"Q. Do you recall verifying, or, rather swearing to an affidavit on the 16th day of December, 1925, the original of which was filed in this action in the proceedings for a temporary restraining order? Do you recall making such an affidavit?

A. I presume I did.

Q. Is this your signature? (Showing paper to the witness.)

A. That is my signature, yes, sir.

Q. Now, do you recall that in that affidavit there is the following recital, commencing on page 5 (reading). "That affiant"—that is yourself—"has read the affidavit of M. G. Kreinman, and among other statements the words on page 5 come to line 25, 'there was furnished and delivered to the Mortgage Corporation of America upon its demand, owner's offset statement.' That said Walker"—yourself talking now—"That said Walker reported to complainant's agents that the said offset statement was given in the following circumstances: That the Mortgage Corporation of America demanded of him, before advancing moneys on the note of $12,500 to know if the complainant had paid him, Walker, anything on the note as a credit, or had any claim against him and that he wanted an offset statement made by complainant to be furnished the Mortgage Corporation of America, to show that the full amount of $12,500 was the correct amount still owing, so that the Mortgage Corporation of America could advance the full amount of $12,500." Do you remember that statement in there?

(Testimony of R. E. Clapp).

A. It is unquestionably true.

Q. And is that the fact?

A. That is what I have stated here today.

Q. Well, is what is in this affidavit the fact?

A. I guess it is, it must be. I made the same statement here today."

The note for $4,500.00 finally came into the hands of Dr. Roper, the man who advanced Walker on it. Witness never paid anything personally upon the principal of either note; the corporation made a principal payment of $11,965.00 on the two notes jointly and the Bank of America paid part of that off on the second note, but did not, to witness' knowledge, pay anything on the first note—never paid anything on the principal only through the assignment made to Walker, and never tendered any money; never knew how much to pay and brought this suit to find out. Never asked Mr. Kreinman how much was due; the conversations with him were directly after this paper was executed and after that, witness never saw him—it may have been three, four or five months after the paper was executed. Knew at the time of these conversations that he was paying quarterly interest, as such, on this $12,500 note; paid with his personal check.

Counsel for defendants shows witness a letter purporting to be on his letterhead dated September 24, 1925, addressed to Kreinman which witness says was signed by him. Witness recalls writing this letter with regard to insurance on the property in question; that was practically the topic of all their conversations.

The Bank of America paid taxes on this property for 1925 and charged the trust with the amount and rendered

(Testimony of R. E. Clapp).

statement to complainant to that effect. The bank also paid taxes for 1926 in the same way.

Plaintiff corporation did not have the project for subdivision along with the tract in question, but was only a beneficiary under certain bank trust which was the only interest it had in it. Witness was not a beneficiary at that time but has since become one by assignment.

Complainant has not, to witness' knowledge, paid any fire insurance on the building in question.

Knew Mr. Porter at the date of the lease to him but does not know his business or occupation and does not recall for what use the building was to be used by him—it was some patent arrangement relating to a truck of some kind.

Counsel shows witness a paper purporting to be a prospectus of "Paramount Motors Corporation of the Pacific," dated May 12, 1924, six or eight months before the transaction here in question. No stock was ever sold after November 7, 1924. Witness helped to prepare the prospectus but was not then an officer or a director. It did not relate to the building in question; that was built for Porter subsequent to the putting out of the prospectus. The building, as it now stands, was not dreamt of at that time.

Defendant's counsel shows witness what purports to be a letter dated January 28, 1925, on letterhead of Paramount Motors Corporation of the Pacific. Witness did not design it. The corporation is still using the same form.

Q. "I will call your attention to the fact that on the left hand side there is the inscription, "Factory location

(Testimony of R. E. Clapp).

at Paramount Heights, Azusa, Los Angeles County, California.' "

A. "Very true."

Q. "Does that refresh your recollection as to what interest the corporation had in the factory building that was being erected here?"

A. "I have told you about this particular factory building that was being built by Mr. Porter, and the evidence is conclusive to my mind, because you have a lease on it. The Paramount Motors Corporation of the Pacific intended at one time to build four or five million dollars worth of motor factories out in that country, and that was their location for a factory site, but this particular building that is in controversy here was built for a man named Porter to occupy, because the papers and the lease here conclusively prove it. There is a difference between the two, if that is what you want to know."

Counsel shows witness paper dated November 1, 1924, on letterhead of Paramount Motors Corporation of the Pacific without signature. Witness may have seen it before, is not positive. Pencil notations on it are not in witness' handwriting. Mr. Norell may have prepared it and delivered it to Walker. The building had been accepted by the corporation and notice of completion filed, and exceptions taken to it.

Defendants offered in evidence what purports to be a notice of completion dated January 31, 1925, to the admission of which paper in evidence the complainant, by counsel, objected upon the ground that the said paper was immaterial and irrelevant to any issues presented by

(Testimony of C. R. Clute).

the pleadings, but the Court overruled said objection and admitted said paper in evidence and same is marked defendant's "Exhibit E." And complainant excepted.

Thereupon the complainant rested its case.

Whereupon the defendants introduced further evidence as follows:

C. R. Clute, being duly sworn, testified in substance as follows:

Is assistant trust officer of the Bank of Italy National Trust and Savings Association, successor to the Bank of America. Witness testified here upon the hearing for a temporary restraining order. Counsel refers to Declaration of Trust in Trust No. 243, purporting to deal with the property in question and some other property, appearing in transcript of the testimony hereinbefore taken, later to be offered in evidence. Witness has a statement of the last two years showing the amount of money received and disbursed under said trust; it shows that no moneys have been paid to the Mortgage Corporation of America out of the proceeds of said trust—no money has been so paid.

Q. By MR. WARNE: "Well, has there been any money available for payment to the Mortgage Corporation of America?"

Question was objected to by counsel for complainant as being immaterial, which objection was overruled by the Court and the witness permitted to answer said question; to which ruling of the Court the complainant, by counsel, then and there *ac*cepted.

A. "No, sir."

Q. "Now, I will ask you if your records show the amount or any amount available for payment under the

(Testimony of C. R. Clute).

conditions of the assignment given, of this particular portion, by the Paramount Motors Corporation of the Pacific, and delivered to you?"

Question objected to by counsel for complainant as incompetent, calling for a conclusion of the witness, which objection was by the Court overruled and the witness permitted to answer; to which ruling of the Court complainant, by counsel, then and there excepted.

A. "Our records show that forty per cent of the improvement fund—payable to who, did you say?"

Q. BY MR. WARNE: "To the assignees under the terms of an assignment to Theron Walker, thereafter assigned to Roper and the Mortgage Corporation of America."

A. "Yes, our records show."

Memorandum shown witness on yellow sheet of paper shows total of these items $2,798.17 which was paid to Dr. Roper and no other moneys or funds have been available for payment. The last payment was made October, 1925. Since that time moneys have been accumulated in that fund and have not been paid out because Mr. Lack, the beneficiary under the trust, "served notice on us not to pay them."

An instrument dated January 18, 1926, addressed to Bank of America, signed F. S. Lack, exhibited to witness, is the instrument referred to.

Counsel for defendants offered the said instrument in evidence, to the introduction of which in evidence the complainant, by counsel, objected; which objection was by the Court overruled and the complainant, by counsel,

(Testimony of C. R. Clute).

then and there excepted. Said paper was admitted in evidence and reads as follows:

"January 18, 1926.

"Bank of America,
Los Angeles, California.
Attention Trust 243.

Gentlemen:

On and after the date hereof, you shall not pay out any funds for improvement in respect to the properties covered by the aforesaid trust unless the same shall have been first approved by F. S. Lack in writing. Under this writing, this will be your authority to pay R. E. Clapp the sum of $113.05 for services and expenses of Detlef Wishman for the months of October, November and December, 1925, and January, 1926, and the items for water as aforesaid in the city of Azusa for said months. Also bill of H. L. Carnahan for $250.

Yours very truly,
F. S. Lack."

(Initialed) "VPS/NAV."

Q. "Mr. Clute, what was the entire amount of the moneys that were to be paid under that trust, if you know?"

A. "Of the moneys that were supposed to come into the trust?"

Q. "Yes, the amount?"

A. "The minimum sales prices were $400,000 total."

Q. "What was the amount that had been earned under that?"

This question was objected to and the Court adjourned for the day.

Upon reconvening of Court, witness was asked:

Q. "At the time the assignment was filed with you, how much money was there in the improvement fund?"

A. "I think that there was $1855.56, and that was all

(Testimony of C. R. Clute).

paid out on the same." There came into the improvement fund afterwards, up to March 14, 1927, $13,615.95. Witness has in his possession the original order directing and authorizing the payment up to $11,965.00.

The paper in question was introduced in evidence and designated plaintiff's "Exhibit No. 9".

Q. "Now, then, what was the total sales value of the lots under the trust?"

Question was objected to by counsel for defendant as being incompetent, irrelevant and immaterial, which objection was by the Court sustained and thereupon, complainant by counsel excepted.

THE COURT: "I don't understand the case as fully as you gentlemen do. The witness answered the question awhile ago as to the amount that had been collected from the improvement fund up to March 1, 1927, as something over $13,000."

MR. WARNE: "That is right."

THE COURT: "Now, he has not testified as to the disposition of that."

MR. WARNE: "He simply testified on our direct examination that only so much was paid on account of the second trust, some $2000. Now, counsel has not proceeded to interrogate him about it, but we shall."

Q. BY MR. ROBERTS: "How much has been paid on the Walker assignment of that fund, Mr. Clute, approximately?"

A. "It is the same amount as the Roper assignment of yesterday. Wait a minute, that is not correct. We paid Mr. Walker some before this."

Q. "What did you pay to Mr. Walker before you paid to Mr. Roper?"

(Testimony of C. R. Clute).

A. "Do you mean after this assignment?"

Q. "Yes."

A. "The same thing—$2798.17."

Q. "You paid that to Mr. Walker?"

A. "Mr. Walker assigned to Martin, or to Roper."

Q. "Well, I misunderstood you. You probably paid that to Dr. Roper, is that it?"

A. "Yes, sir."

THE COURT: "Now, let me get that straight."

Q. "This assignment went first to Walker. While he had it, did you pay him anything on it?"

A. "No."

Q. "Was anything paid to Walker?"

MR. WARNE: "Not at all."

MR. ROBERTS: "Now, just let the witness answer that."

THE COURT: "He says that he didn't have it then, so he doesn't know. Walker then assigned to a man named Roper?"

A. "Yes, sir."

MR. WARNE: "The first payments out of it were to come to Roper."

THE COURT: "Now, I can't follow you men who know this thing from A to Izzard, and you all talk in a general way about it, and I don't understand it. An assignment was made by the plaintiff here to Walker?"

MR. WARNE: "Right."

THE COURT: "Of his interest in an improvement fund?"

MR. WARNE: "That is right."

THE COURT: "Now did Walker get anything?"

MR. WARNE: "He did not."

(Testimony of C. R. Clute).

THE COURT: "Then Walker assigned to Roper, is that right?"

MR. MACK: "He split the assignment in two parts, —one to the defendant here, and a part to Roper."

THE COURT: "Now, that is new entirely."

MR. MACK: "But Roper had precedence. He was to receive the first moneys up to the sum of $4500, the balance to go to this defendant."

THE COURT: "Now, I am beginning to get somewhere."

(Discussion between the court and counsel.)

THE COURT: "Now, will you gentlemen please now stipulate what the improvement fund was to consist of? What under the trust is the improvement fund—the replenishment of the improvement fund—the language which says "To be returned out of the improvement fund." Now, how was that improvement fund created out of the trust? Let's get that."

Q. BY MR. ROBERTS: "Have you any documents there, Mr. Clute, that would indicate what was the bank's understanding of that matter?"

A. "I have the documents which state what the improvement fund is, or should be."

Q. "Well, what is that document?"

A. "Declaration of trust."

THE COURT: "And it shows what?"

MR. WARNE: "Will you point to it, Mr. Clute?"

MR. STILES: "We don't think under the pleadings in the case any of this discussion is material.

MR. COHN: "If it isn't material, it should be stricken."

THE COURT: "Questions are objected to, and they

(Testimony of C. R. Clute).

should be pertinent to the issue, and in order to pass on these things I must know the issue. I can't know the issue unless I understand what you are trying. What is now before us?"

MR. STILES: "It says——"

MR. WARNE: "You are reading from where?"

MR. STILES: "It is this same trust on page 22. (Reading) 'Any part of all remaining money received may be applied if found necessary to pay accounts due for improvements on said property up to but not in excess of eighty thousand dollars.' "

THE COURT: "For improvement, but not for paying——"

MR. STILES: "Yes, but that becomes the improvement fund, up to $80,000."

MR. MACK: "That has been amended, and that is now what has been assigned to us."

MR. STILES: "The assignment itself shows it has been assigned, other than this $80,000.."

REDIRECT EXAMINATION

There were other costs and charges to be paid out of moneys received under the improvement fund. They were costs of the trust, taxes and assessments, out of the thirteen thousand odd dollars received, and twenty-seven hundred odd dollars were paid to Roper, the balance disbursed under the trust—none of it disbursed to the defendants.

After the receipt of the stop-order from Mr. Lack, payments ceased. "Mr. Lack was the original beneficiary under the trust, and under the terms of the trust that order was obeyed by our company. It stopped disposing of any moneys after the letter was received by the

(Testimony of Theron H. Walker).

trustee." There is now in the improvement fund $1350.68.

Counsel for defendants introduced in evidence the Declaration of Trust referred to and the same was marked defendant's "Exhibit F"; a copy of an assignment designated defendant's "Exhibit G"; another paper which is marked defendant's "Exhibit "H"; another document marked defendant's "Exhibit I", and another marked defendant's "Exhibit J".

Theron H. Walker, being duly sworn, testified in substance as follows:

Was engaged in contracting and engineering on or about November 28, 1924, under the name Theron Walker Engineering and Construction Company. The signature "Theron Walker Engineering and Construction Co., Theron Walker," on plaintiff's "Exhibit No. 2", Builder's Contract, is witness' signature. The memorandum purporting to be a certified copy of a Resolution under date of December 3, 1924, attached to Builder's Contract, was received with the contract.

Witness is shown a number of documents clipped together and states that with the exception of the first one they were documents presented to him by Paramount Motors Corporation of the Pacific by Mr. Clapp for the purpose of substantiating the company's responsibility and guaranteeing the Porter lease. The top paper is a copy made by witness of some other information he had given him and the whole was turned over to Mortgage Corporation of America. Mr. Norell may have handed witness some of the papers as he sometimes acted in the capacity of messenger between witness'

(Testimony of Theron H. Walker).

office and Mr. Clapp's, but witness' dealings were with Mr. Clapp.

The papers referred to were offered in evidence but upon objection were excluded for the time being by the Court.

Q. BY MR. COHN: "Now, Mr. Walkr, will you please explain to the Court who Mr. H. E. Seaton is?"

A. "H. E. Seaton is merely a name—a dummy, you might say, that I used to negotiate certain papers for me."

MR. ROBERTS: "Was he an actual person? You ought to know that."

A. "Yes; he is an actual person."

When Mr. Clapp was first brought to witness' office to finance the building, coming in company with some of the other directors, and laid the plans before witness, witness told him he doubted if he could carry the load himself but had a friend who might carry a part if it, by the "load" was meant the $17,000, cost of the building in connection with witness' other work.

Negotiations were continued for several days before witness finally instructed Mr. Clapp that he would have the trust deeds made out in the name of H. E. Seaton, "and if Seaton could not carry along with me, I would get somebody else to carry along with me, or sell them, or something of the sort, along that line." Witness did not inform Mr. Clapp that Seaton would have the necessary money to put up the $17,000 but informed him that witness only expected Seaton to help him in his financing. It happened later "that Mr. Seaton could not afford to advance any money into any kind of a deal at this time," and witness told Mr. Clapp, "I have your contract to construct your building, and I will go ahead and

(Testimony of Theron H. Walker).

construct your building anyway. I will do one of two things—I will either keep the paper or else find a buyer for it. It is necessary, if I find buyers, to look for them amongst the different mortgage companies that there are in the city, which I eventually did."

When Mr. Clapp and his associates were first brought to witness they were brought to his office by a broker named Dewey, and a handful of documents, including their rough sketches for a building, and their plan of operation, including also a set-up, or what they proposed to do was all brought to witness at that time.

Counsel shows witness defendant's "Exhibit D" on the letterhead of Paramount Motors Corporation of the Pacific. This was brought to witness by Mr. Clapp at the time that he came over with his associates to witness' office, and handed to witness as to what they were willing to do in order to get this building put up. They were willing to deed the land and provide a lease for the building, and make other assignments and so forth. Witness kept this memorandum in his files for a time and eventually made a copy of it and presented it to various people to whom he offered to sell the deeds of trust; presented a copy with some slight changes that were made according to agreement to Mortgage Corporation of America. All this was done before the Mortgage Corporation received an assignment of a note and trust deeds and was brought about by certain demands upon Mr. Clapp that witness could not loan the money to build the building unless he was absolutely secured by knowing where his payments were going to come from—"they had no money, and I wanted to be positively assured that I was going to get that $800 a

(Testimony of Theron H. Walker).

month some place"—the $800 referred to in the deed of trust and note. Mr. Clapp said, "He could get me a lease on that building for $300 a month, and assign the lease to me to collect it; that in addition to that they had a couple of hundred dollars a month coming in from the sale of lots from an improvement fund, and that he would give me that, and that I could apply that against it."

The defendants offered in evidence the documents mentioned by the witness and to the admission of same in evidence the complainant, by counsel, objected upon the ground that they were irrelevant to any matter in issue and not admissible under the pleadings and incompetent as evidence; which objection the Court overruled and admitted said documents in evidence and the same are marked defendant's "Exhibit K," and complainant excepted.

Counsel exhibits to witness the defendant's "Exhibit C". Witness saw it along approximately at the time it was dated, December 18th; received it from Paramount Motors Corporation, from Mr. Clapp; told him at that time it was necessary to have "Owner's Offset Statement" if he cared to go ahead with the project as witness proposed to sell the trust deeds that he had in his possession and had a buyer for them, and most likely told him who the buyer was. Very likely told Mr. Clapp he had sold the note and deed of trust to some Jews but does not remember whether he used those terms; very likely told him that he had sold the papers to Mortgage Corporation of America and that it was necessary to have this offset statement; probably presented the statement to Mr. Kreinman, may have mailed it to him. The

(Testimony of Theron H. Walker).

part of the paper where it says, "H. E. Seaton, by Theron Walker Engineering and Construction Co., Theron Walker" is in witness' handwriting. The signature "H. E. Seaton" is also in witness' handwriting. Up to the time he delivered or mailed this paper to Mortgage Corporation of America he had received no money from that corporation by virtue of the assignment of the note and deed of trust.

Counsel for complainant moved to strike out from the evidence the so-called "Offset Statement," defendant's "Exhibit C," for the reason that it is incompetent and immaterial, witness having testified that Mortgage Corporation of America had already purchased the note and deed of trust when witness received this paper which is not addressed to Mortgage Corporation of America, and there is no allegation in the pleadings that the defendants relied upon or acted upon it and does not tend to constitute an estoppel and is not evidence of any material fact; which motion to strike out said document, the Court overruled, and to said ruling of the Court the complainant excepted.

In addition to the offset statement and note the deed of trust, there was delivered to Mortgage Corporation of America the lease on the proposed building, including the assignment of the $300.00 a month that was supposed to come from it, also the assignment of certain moneys that were anticipated coming into the Bank of America which had been assigned to witness as guaranteeing these monthly payments, which witness assigned to Mortgage Corporation of America, and also a guarantee to them that they would get their monthly payments; also delivered to Mortgage Corporation of America a certificate

(Testimony of Theron H. Walker).

of title which was delivered before witness received any money on the trust deed note.

MR. COHN: "I again wish to renew my offer, if the Court please, of the lease, the guarantee of the lease, and statements by——"

THE COURT: "Guaranteed by whom?"

MR. COHN: "By Mr. Clapp and Mr. Coffee, the directors and officers of this corporations."

THE COURT: "As individuals?"

MR. COHN: "As individuals. And their personal statement showing their net worth, or their alleged net worth, which the witness testified were the inducements and the possibility that made him go out in the open market and offer this note and trust deed for sale to various mortgage companies. I now offer this in evidence, if your Honor please, as defendant's Exhibit next in order."

To the admission of which matters in evidence the complainant, by counsel, objected for the reason that they were irrelevant and immaterial, being foreign to any issues raised by the pleadings; but said objection was overruled by the Court and said documents were received in evidence and marked defendant's "Exhibit L"; to which objection, ruling and action of the Court and admittance of said documents in evidence the complainant, by counsel, then and there excepted.

CROSS-EXAMINATION

Mr. H. E. Seaton is a man employed in the city in Bullock's Department Store and was so employed at the time of the transaction in question. Witness cannot say from what person he received "Owner's Offset Statement," Defendant's "Exhibit C," but is inclined to think

(Testimony of Theron H. Walker).

he received it from Mr. Clapp, the negotiations being done with Mr. Clapp, Mr. Norell acting as a messenger in delivering papers sometimes at Mr. Clapp's suggestion; those are the only two men with whom witness dealt in the Paramount Motors Corporation. Witness added to the paper the words, "The above is correct" and the name "H. E. Seaton." The statement in the paper, "I understand that the said note and trust deed have been assigned and that the new owner's name and address is Mortgage Corporation of America," probably expressed the fact at the time, but it was all done before witness received any money from the Mortgage Corporation of America.

Witness probably told Mr. Clapp that he would have to sell the $12,500 note at a discount.

THE COURT: "I would like to know when the assignment for the improvement fund was delivered to him, with reference to the other transactions, if he knows."

THE WITNESS: "I can tell you, your Honor."

Q. BY MR. COHN: "And give all conversations also in connection therewith."

A. "When Mr. Clapp and his directors came to my office, that was when this was taken up. I said, I believe—I won't go into that, either. The gentleman is not here. I told him, 'There are certain things that I must have before I can write this paper up and take the contract of this building. I must have an authority from your corporation to write these notes, and I must have, according to your own written statement in front of me here, which you offer as additional security, that assignment that you have in the bank guaranteeing those payments. I must have that properly signed by your secre-

(Testimony of Theron H. Walker).

tary, and a resolution properly taken care of. I must have this lease and I must have this lease guaranteed by someone of responsibility.' Mr. Clapp said he would guarantee it personally, and that he would get another gentleman by the name of Mr. Coffee, who was worth some hundred and some odd thousand dollars, and guarantee it, both guaranteeing that if Porter didn't pay that $300 a month, that they would pay it, and that would apply to the $800. I asked them, 'How much have you got coming from this improvement fund at the present time in the bank?' They believed it was about four or five hundred dollars a month, about forty per cent of which would have been assigned to me. And they said, 'However, just as soon as you start the building, our lot sales will pick up to such a great extent that it will more than exceed or would more than exceed the $800 a month,' in connection with the $300 that we were to get from the lease. I said, 'Prepare all those papers and bring all those papers to me, and I will draw up the necessary mortgages and trust deeds and we will get started on it.' Then from that time on the papers drifted in back and forth, and we held telephone conversations regarding their correctness, and so forth.'"

Q. "What was said, Mr. Walker, about the repayment of the principal?"

MR. STILES: "Just a moment: Now, we move to strike out the answer as not responsive to the question, and for the further reason that it is immaterial. It cannot vary the contracts that were entered into, and that were set out in the pleadings, and does not tend to support any issue under the pleadings. The testimony is irrelevant and immaterial."

(Testimony of Theron H. Walker).

THE COURT: "Motion denied."

MR. ROBERTS: "Note an exception."

Q. BY MR. COHN: "What if anything did Mr. Clapp or his associates in the Paramount Motors Corporation say about the repayment of the principal—this $12,500 note, particularly?"

A. "That was all defined before they came to my office in a document that they brought to me, which stated that they only wanted to borrow the money for a year or a year and a half, and could pay it back at the rate of $800 a month." That was their own statement to me."

Q. "And how about the balance after the $800 was paid?"

A. "It was to be paid in a lump sum, if there was any unpaid balance due. They were merely asking for a short time loan."

Nothing was said in the conversation with Mr. Clapp that the delivery to witness of the assignment on the improvement fund would be a payment of the $17,000 notes—that was never mentioned at any time. Mr. Clapp is the one whom witness told he must have the offset statement; never met the secretary who signed it.

CROSS-EXAMINATION

Q. BY MR. ROBERTS: "Mr. Walker, when and how did you receive your money from the Mortgage Corporation of America?"

The foregoing question was objected to by counsel for defendants as immaterial; which objection was sustained by the Court; to which ruling and action the complainant, by counsel, then and there excepted.

(Testimony of Michael G. Kreinman).

Michael G. Kreinman, being first duly sworn, testified in substance as follows:

Was president of the Mortgage Corporation of America on or about the 17th day of December, 1925; bought the paper in question, the Paramount Motors Corporation note of $12,500. At the same time there was delivered to witness by Walker a prospectus in evidence, marked defendant's "Exhibit K," on the letterhead of Theron Walker. Had a conversation with Mr. Clapp with reference to payment of interest on the $12,500 note in Clapp's office; called him up and told him the interest should be paid. He said they were hard up but were going to pay in a few days, or something. Had no conversation in which Clapp said that the corporation would not pay but he would. Received three payments of $250.00 each and they are endorsed on the note. No part of the principal sum has been paid. With reference to payment of the principal sum of $800.00 due August 1st, witness called Mr Clapp by telephone and told him he would like to have payment and Clapp said that he was arranging to refinance somewhere and would pay the whole amount when due; never said anything about having paid $11,-965.00, or any other sum, on account.

CROSS-EXAMINATION

Witness had the assignment from Mr Walker of the $11,965.00 and knew that it was in the bank.

Q. "Yes. You took that from Mr. Walker. Mr. Walker assigned it to you?"

A. "Yes, sir."

Q. "Mr. Kreinman, you caused the Title Guarantee & Trust Company to publish a notice of the trustee's sale, did you not?"

(Testimony of Michael G. Kreinman).

Question objected to as covered by stipulation.

Q. BY MR. ROBERTS: "Did you not in that notice state that you had been obliged to, and have paid out and advanced the sum of $2579.43 for the purpose of protecting the interest of said trust."

Question objected to.

THE COURT: "What is the purpose?"

MR. ROBERTS: "Well, what we intend to show is this: This trust deed notice here shows that—we want to ask what these items are."

MR. WARNE: "Well, this is not the proper occasion."

MR. ROBERTS: "Just a moment: We have a right to ask him what these items are, because he is endeavoring to sell our property for a debt of which we know nothing. We owe him on the face of the papers, we will say, for the purpose of this illustration, $12,500——

THE COURT: "Objection sustained."

MR. ROBERTS: "Note our exception. We offer to show that the sale was to be made for $15,729.37, and that he has placed an item in there of moneys purporting to be advanced by him of $2579.43, and we want to know for what purpose those were advanced—this $2579.43."

MR. WARNE: "We object to the offer——

THE COURT: "The objection has been sustained. He is merely making an offer of what he expected to show."

MR. ROBERTS: "Now then, your Honor, for the purpose under the statute, we will make Mr. Kreinman our own witness for the purpose of asking these questions."

THE COURT: "The question that was just asked?"

(Testimony of Michael G. Kreinman).

MR. ROBERTS: "Yes."

THE COURT: "Objection sustained."

MR. ROBERTS: "We propose to call the witness as our own witness."

MR. WARNE: "You may do that."

THE COURT: "And you are going to ask the question previously asked?"

MR. ROBERTS: "No, we propose to show by him that he has included in this notice of trustee's sale, $2000.00 alleged attorney's fees arising out of his defense of this suit in this court during the spring months, when the matter was before the court."

THE COURT: "Your statement is in the record many times during this trial, that the only issue is whether or not that assignment was a sale or collateral, and I think that is correct. I think you have stated that correctly, and therefore, under your own statement it would be immaterial, but these are questions that are not at issue here."

MR. ROBERTS: "That is because we ask those questions, because the Court allowed Mr. Walker to go into all those different matters."

THE COURT: "Objection sustained, and note an exception for counsel."

R. E. Clapp, upon rebuttal recalled, testified further in substance as follows:

Q. BY MR. ROBERTS: "Mr. Clapp, you have heard the questions asked you by the defense attorneys that you had not a certain conversation with Mr. Cohn in reference to the fixing of time, and that you had said that this was for delay. Will you state what that conversation was?"

(Testimony of R. E. Clapp on Rebuttal).

MR. WARNE: "That is not proper rebuttal."

THE COURT: "That is not proper rebuttal. Why do you ask it at this time?"

MR. ROBERTS: "Because I hadn't any opportunity before, that was all."

THE COURT: "Very well, cross-examination if he was examined by—or, redirect, if it was on your examination. He may answer, though."

MR. WARNE: "No objection."

THE COURT: "If you say that the matter was overlooked before."

MR. ROBERTS: "That is one of the reasons."

MR. STILES: "Well, it wasn't overlooked, but it occurred after Mr. Clapp was on the stand."

THE COURT: "No; Mr. Clapp was asked about it, wasn't he, on the stand by counsel for the defense, and if it was on cross-examination you had the right of redirect. If Mr. Clapp was called by you, then it was, or if Mr. Clapp was called by the defense, then you could have asked him on cross-examination; but be that as it may, we often overlook things in battles. I have tried many cases and very often neglected to ask things that I should have asked, and so I will let you ask him the question."

MR. ROBERTS: "What was the question—if you had such a conversation with Mr. Cohn?"

A. "My statement substantially to Mr. Cohn was that it was rather a coincidence that yesterday this case came up, and yet at the same time a settlement was being entered into with the City of Azusa after a three-year battle to get them to let a contract for the improvements to go in on the subdivision for the sale of lots, out of

(Testimony of S. C. Cohn).

which came the money to pay that assignment in question in this court. And that to get this thing through so that the lot selling campaign could go along, $10,000 yesterday was being paid as additional compensation to the City of Azusa for the land and in settlement of the whole controversy, so it could proceed after being tied up for two years, and there was so much time being consumed."

The assignment to Walker of the $11,965.00 claim was a considerable time after the recordation of the trust deed on December 17th because it could not be filed with the Bank of America until after the 28th day of February, or sometime in February, due to other orders taking money coming into the improvement fund.

SURREBUTTAL

S. C. Cohn, being duly sworn, on behalf of the defendants testified in substance as follows:

Is one of the counsel for defendants in this case; had a conversation with Mr. Clapp yesterday in the court room after the noon adjournment.

A. "Mr. Clapp came over to me and shook my hand, and I asked him,—I said, 'What is the purpose of all of this procedure that we are going through?' 'Well,' he said, 'we needed more time. We were not able to pay at the time before that occurred.' And I asked him, 'What is the present situation on that subdivision?' And he substantially told me in reference to the ten thousand dollar payment, as he himself testified a few moments ago—I don't remember the exact language, but something to the effect that there was some money coming in.' "

THE COURT: "Well, just let it stand at that. You say he said substantially that?"

A. "Yes. I asked him,—I said, 'Well, will that enable

(Testimony of S. C. Cohn).

you to take care of this entire payment due?' He said, 'No; there are other obligations and,' he said 'we still need more time. And if we should lose in this proceeding, it will be necessary to appeal for the purpose of gaining more time.'" And then I told him,—I said to him, I said, 'That is rather a foolish viewpoint. It merely increases the expense.' And he said, 'Well, you should not worry about that, that is how you lawyers make your living.'"

The foregoing being all the evidence introduced by either complainant or defendants, the respective parties rested the case.

The exhibits referred to in the foregoing statement are to accompany this statement of the testimony.

The foregoing narrative statement of the testimony of sundry witnesses called on behalf of the respective parties having been duly lodged in the clerk's office by the complainant and notice thereof having been given to the defendants, and the counsel for both parties now appearing, pursuant to said notice and adjournment thereof, and counsel for the complainant consenting to and making certain amendments upon the face of said statement and counsel desiring that the portion of said testimony set forth in the exact words of the witnesses should be so set forth, and the undersigned judge so directing, the said statement is now approved and filed and ordered made a part of the record for the purpose of appeal herein.

EDWARD J. HENNING,
District Judge.

Dated September 13th, 1927.

(Endorsed): Filed Aug. 15, 1927. R. S. ZIMMERMAN, Clerk. By L. J. CORDES, Deputy Clerk.

PLAINTIFF'S EXHIBIT NO. 1

BUILDER'S CONTRACT

Form adopted by joint committe American Institute of Architects, Association of Creditmen of the Building Material Dealers, Builders Exchange of Los Angeles, L. A. Bldg. Materialmen's Protective Assn. and Master Builders' Assn. of L. A.

THIS AGREEMENT Made the 28th day of November, in the year one thousand nine hundred and twenty four by and

BETWEEN Paramount Motors Corporation of the Pacific, a corporation, of the County of Los Angeles, State of California, party of the first part (hereinafter designated the owner),

AND Theron Walker Engineering & Construction Company of the County of Los Angeles, State of California, party of the second part (hereinafter designated the contractor); the singular number only being used herein, but to include the plural, and the masculine to include the feminine;

WITNESSETH: That in consideration of the covenants and agreements herein contained to be by them kept and performed, it is hereby agreed by and between the parties above named as follows, to-wit:

FIRST. The contractor agrees to furnish and provide necessary labor and materials, and tools, implements and appliance, and to do and perform in a good and workmanlike manner, the following work: (here describe work to be done) One factory building of one and one-half stories to be located at Paramount Heights, Azusa, California, to be situated upon said real property hereinafter described; said work to be done and materials furnished therefor in strict conformity with the plans and specifications for the same, prepared by party of the second part, which are hereunto annexed and filed herewith in the office of the County Recorder of Los Angeles County, said plans consisting of blue prints which are hereby expressly agreed upon as being the plans referred to in this contract, and not copies of the originals.

SECOND. Said building and works shall be erected and constructed upon the lot and parcel of land situated in the County of Los Angeles, State of California and described as follows, to-wit: A twenty (20) acre square of the West sixty (60) acres of the Southwest One Hundred and Sixty (160) acres of Sub-division No. 2 of Azusa Land and Water Company, as per map recorded in book 43, page 94, of Miscellaneous Records of the City and County of Los Angeles.

THIRD. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Seventeen Thousand Dollars ($17,000.00), subject to additions and deductions as herein provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments, as follows: By issuing to a Contractor a First Mortgage or Trust Deed on above mentioned property and building in the amount of Seventeen Thousand ($17,-000.00) Dollars.

FOURTH. Said Architect shall provide and furnish to the Contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to the approval of said Architect, or a Superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications.

FIFTH. Should the Owner or the Architect, at any time during the progress of the work, request any modifications, alterations or deviations in, additions to, or omissions from, this contract or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to or deducted from the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation, based upon the market value of labor and material. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended or

modified by such changes, whatever may be the nature or extent thereof.

SIXTH. Should the Contractor at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the reasonable expenses thereof shall be deducted from the amount of said contract price.

SEVENTH. Said Contractor shall have ninety working days from the date hereof within which to complete said contract; but the time during which the Contractor is delayed in said work by the acts or neglects of the Owner or his employees, or those under him by contract or otherwise, or by the acts of God which the Contractor could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes, boycotts or like obstructive action by employees or labor organizations, shall be added to the aforesaid time for completion, by a fair and reasonable allowance; also any additional time required for additional or extra work ordered by the Owner.

EIGHTH. At the time each payment or installment becomes due, and on the final completion of the work, certificates in writing shall be obtained from the said Architect, if there be a supervising Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said Architect shall at said times deliver said certificates under his hand to the Contractor, or in lieu of such certificates, shall deliver to the Contractor, in writing, under his hand, a just and true reason for not issuing the Certificates, including a statement of the defects, if any, to be remedied, to entitle the Contractor to the certificate or certificates.

NINTH. The payment of the progress-payments by the Owner shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subject to inspection and approval of the Architect, Superintendent or Owner at the time when it shall be claimed

by the Contractor that the contract and works are completed, but the Architect, Superintendent or Owner shall exercise all reasonable diligence in the discovery, and report to the Contractor, as the work progresses, materials and labor which are not satisfactory to the Architect, Superintendent or Owner, so as to avoid unnecessary trouble and cost to the Contractor in making good defective parts.

TENTH. The specifications and drawings are intended to co-operate so that any work exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work that is to be done thereunder, or of the manner in which the said work is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void.

ELEVENTH. Should any dispute arise between the Owner and Contractor, or betwen the Contractor and Architect, respecting the true construction of the plans or specifications, the same shall, in the first instance be decided by the Architect; and should the Contractor be dissatisfied with the justice of such decision, he shall, nevertheless, conform thereto, but shall not thereby be debarred from recovering from the Owner reasonable compensation for any extra or additional work thus entailed, if not in fact a part of the work herein agreed to be performed.

TWELFTH. In case said work herein provided for should, before completion, be wholly destroyed by defective soil, earthquake or other superhuman cause which the Contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the terms of this contract; and the loss occasioned thereby, and to be sustained by the Contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of

the loss, and for which no payment is yet due under this contract.

THIRTEENTH. The Owner shall during the progress of the work maintain full insurance on said work, in his own name, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

(SEAL) PARAMOUNT MOTORS CORPORATION OF THE PACIFIC.
S. S. SMITH, *Vice-President*
CHAS. H. NORTON, *Secretary*
Theron Walker Engineering & Construction Company,
THERON WALKER.

(Endorsed): Filed Apr. 7, 1927. R. S. ZIMMERMAN, Clerk. By FRANCIS E. CROSS, Deputy Clerk.

PLAINTIFF'S EXHIBIT 2

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS, AZUSA
Los Angeles County
California

EXECUTIVE OFFICES
Fifth Floor California Bank Building
629 So. SPRING STREET
Phone TRinity 1386
LOS ANGELES

December 3, 1924.

This is to certify that the following is a true and correct copy of a resolution duly passed and ratified at a meeting of the Board of Directors of Paramount Motors Corporation of the Pacific, duly held

in the office of the Corporation in the City of Los Angeles, California, December 3, 1924.

RESOLUTION

"WHEREAS, that it is the desire of this Corporation to enter into a contract with the Theron Walker Engineering & Construction Company of Los Angeles, California, for the erection and completion of a factory building, in accordance with plans and specifications furnished by said Engineering Company, to be attached to said contract and accepted by this Corporation, and to be paid for out of funds secured by loan from said Engineering Company, or H. E. Seaton; now,

THEREFORE BE IT RESOLVED, that, the officers, or any of them, are hereby authorized, directed and instructed to enter into a contract with Theron Walker Engineering & Construction Company, to construct a factory building for this Corporation on a part of a certain 20.00 Acre Parcel—East and West Center Line of which is the Center Line of Paramount Street; a portion of Lots 11 and 12, Subdivision No. 2, Azusa Land and Water Company, as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, California; that said unit shall not cost to exceed $17,000.00, and that upon acceptance of plans therefor by the Vice-President and managing director of this Corporation, said construction work shall be looked after by said officers on behalf of this Corporation."

CHAS. H. NORTON, *Secretary,*

SEAL PARAMOUNT MOTORS CORPORATION OF THE PACIFIC.

(Endorsed): Filed April 7, 1927. R. S. Zimmerman, Clerk; By Francis E. Cross, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 4

PARAMOUNT MOTORS CORPORATION

Of the Pacific

Factory Location

PARAMOUNT HEIGHTS, AZUSA,

Los Angeles County, California.
Executive Offices
Fifth Floor California Bank Building
629 South Spring Street
Phone FAber 1386
Los Angeles, November 29, 1924.

For value received, being loan to this corporation of $17,000.00, this day for building of factory at Paramount Heights, Azusa, California, the Paramount Motors Corporation of the Pacific, hereby sells, assigns and transfers to Theron Walker Engineering & Construction Co., the following accounts, being monies advanced by this corporation for improvements at Paramount Heights, Azusa, California, and payable from improvement funds under Trust #243, Bank of America:

Improvement advances Acct #1	$10,994.85
Improvement advances Acct #2	970.15

It being understood that all or any portion of said amount when paid to Theron Walker Engineering & Construction Co. shall become a credit on the principal and interest of said aforementioned loan.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC.
(Signed) S. S. Smith
Vice-President.
(Signed) N. E. Bliss
Treasurer.

SEAL

(Seal): Corporate Seal 1923 Paramount Motors Corporation of the Pacific Delaware.

Paramount in Name Performance Economy Appearance Value Sale Price."

(Endorsed): Filed April 7, 1927; R. S. Zimmerman, Clerk, by Francis E. Cross, Deputy Clerk.

PLAINTIFF'S EXHIBIT 7

THIS DEED OF TRUST Made this 1st day of December, 1924, Between Paramount Motors Corporation of the Pacific, a Delaware corporation organized and doing business under the laws of the State of California, and having its principal place of business in Los Angeles County, California, party of the first part, TITLE GUARANTEE AND TRUST COMPANY, a

corporation, having its principal place of business in the City of and County of Los Angeles, State of California, party of the second part, and H. E. Seaton, party of the third part:

WITNESSETH: WHEREAS, the said Paramount Motors Corporation of the Pacific, a corporation, has borrowed and received of the said party of the third part the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, and has agreed to repay the same to the said part of the third part, in gold coin, with interest, according to the terms of a certain promissory note executed and delivered by the said party of the first part, said note being in words and figures as follows:

TRUST DEED NOTE

INSTALLMENTS IN THIS NOTE DO NOT INCLUDE INTEREST

KEEP THIS NOTE WHEN PAID for it must be returned with the Deed of Trust, to the Title Guarantee and Trust Company, who will cancel and retain it, before the Release of the Trust Deed will be executed.

$12,500.00 Los Angeles, Cal., December 1, 1924.

For value received we promise to pay H. E. Seaton, or order, the sum of Twelve Thousand Five Hundred Dollars, in installments of Eight Hundred ($800.00) or more Dollars, each due on the first day of every month beginning August 1st, 1925, and continuing until December 1, 1925, on which date the remaining unpaid balance of Nine Thousand Three Hundred ($9,300.00) Dollars shall be paid at Los Angeles, California, all principal unpaid to bear interest from date until paid, at the rate of eight per cent per annum, payable quarterly. Should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of the principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a Deed of Trust to the Title

Guarantee and Trust Company, and may be registered when accompanied with the Deed of Trust duly recorded, on presentation at the Company's office.
(SEAL)

PARAMOUNT MOTORS CORCORATION
OF THE PACIFIC, a corporation.
S. S. SMITH, *Vice-President.*
CHAS. H. NORTON, *Secretary.*

This Trust Deed may be used as security for an additional loan to be evidenced by promissory note or notes, of an amount not to exceed One and no/100 Dollars, provided, that no lien shall attach as security therefor, unless the Trustee, in its discretion, shall grant its written consent by endorsement on the note. A fee may be charged for this service.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, in consideration of the aforesaid indebtedness to the part of the third part and of One Dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing payment of the sum of the indebtedness stated in said promissory note, or the renewal or renewals thereof, and of any sum or sums of money, with interest thereon, that may be paid or advanced by, or may otherwise be due to, the parties of the second or third part, under the provisions of this instrument, does by these Presents, Grant, Bargain, Sell, Convey and Confirm unto the party of the second part, and to its successors and assigns,

In Trust, However, With Power of Sale, all the following described property situate in the County of Los Angeles, State of California, to-wit:

A 20.00 Acre Parcel—East and West Center Line of Which is the Center Line of Paramount Street.

A portion of Lots 11 and 12, Subdivision No. 2, Azusa Land and Water Company, as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, California, and more particularly described as follows:

Beginning at a point in the westerly line of Motor Avenue, as shown on Map of Tract No. 8507, as recorded in Book 102, Pages 78 and 79

of Maps, Records of said County, said point of beginning bears S. 0° 12′ 02″ W. 815.36 feet from the northwest corner of said Tract No. 8507; thence from true point of beginning S. 0° 12′ 02″ W. along the westerly line of said Motor Avenue, a distance of 921.90 feet to a point; thence N. 89° 47′ 58″ W. a distance of 945.00 feet to a point; thence N. 0° 12′ 02″ E. a distance of 921.90 feet to a point; thence S 89° 47′ 58″ E. a distance of 945.00 feet to the point of beginning,

Containing 20.00 acres.

And Also all the estate and interest, homestead or other claim or demand, as well in law as in equity, which the said part.....of the first part now ha.....or may hereafter acquire of, in and to the said property, with the appurtenances, including water, water-rights, pipes and ditches and all buildings and improvements thereon or that may be placed thereon.

In consideration of the funds obtained and secured by this Trust Deed, the makers hereof hereby waive the right to have said premises registered under the "Land Title Law," an act approved by the electors of California, and in effect December 19, 1914, and agree that during the life of this indenture no application shall be made therefor; and this agreement shall be binding upon all subsequent owners of said premises.

And the part..... of the first part agree.....to pay all taxes and assessments levied upon the property described herein, and will keep all buildings on said premises insured for the benefit of the part of the third part in a sum of not less than Seventeen thousand Dollars,

To Have and To Hold, the same to the party of the second part and to its successors and assigns (said party of the second part being hereby expressly authorized, if it so elects, to convey, subject to the Trusts herein expressed, the property above described to such person or corporation as it may select as a successor), upon the Trusts and confidences hereinafter expressed, to-wit:

Firstly. During the continuance of these Trusts the party of the third part and the party of the sec-

ond part, its successors or assigns, are hereby authorized to pay, without previous notice, all liens, including interest due and unpaid thereon, now existing, or that may hereafter be imposed, upon said property, which may in their judgment affect said property or these Trusts, for the benefit and at the expense of said part.....of the first part; to defend any suit or proceeding that they may consider proper to protect the title to said property, to maintain insurance on the building on the premises to the satisfaction of the party of the second part, and in case the premises are neglected or abandoned the party of the second part may, at its discretion, take possession without notice and use all necessary means to make the same productive and these trusts shall be and continue as security to the parties of the second or third part, or their assigns, for the repayment, in gold coin of the United States, of the money so borrowed by the said part..... of the first part, and the interest thereon, and of all amounts so paid out for fees, services, costs and expenses incurred, including all money advanced not included in the note....., and the part..... of the first part hereby agree..... to pay immediately and without demand all moneys so advanced not included in said note....., with interest thereon at the rate of one per cent. per month until paid.

Secondly. In case of the said part..... of the first part shall well and truly pay, or cause to be paid, all sums of money so borrowed, as aforesaid, and the interest thereon, and shall upon demand repay or deposit all other money secured or intended to be secured hereby, and the reasonable expenses of this Trust, then the party of the second part, its successors or assigns, upon the surrender of the Deed of Trust and the note..... hereby secured, and upon request of the party of the third part, or.....h..... assigns, shall reconvey all the estate in the property described herein unto the part..... of the first part who held the legal title at date hereof, or its successors or assigns, and at its costs. It being understood and agreed that if a reconveyance or partial reconveyance is made at the request of the part..... of the third part or .....h.....

assigns, the note..... and this Deed of Trust being surrendered, the Trustee shall not be liable if any part of the debt secured by the Deed of Trust is unpaid.

THIRDLY. If default shall be made in the payment of any of said sums of principal or interest when due, in the manner stipulated in said promissory note....., or in the reimbursement of any sums advanced as provided herein to be paid, or of any interest thereon, then the said party of the third part, or its assigns, may declare all of the indebtedness secured hereby due and payable at once, and may cause to be filed in the office of the County Recorder of the County where some part of the property securing the debt is located, a notice that the debt is due and unpaid, and that it elects to have part, or all of the property described in the deed of trust, sold to satisfy the debt and costs; and three months after the filing of said notice, the party of the second part may proceed to sell the above granted property, or such part thereof as said party of the second part, its successors or assigns, shall in its discretion find it necessary to sell, in order to accomplish the objects of these trusts, in the manner following, namely: The party of the second part, or its successors or assigns, shall first publish notice of the time and place of such sale, with a description of the property to be sold, at least once a week for three successive weeks, in some newspaper of general circulation, printed and published in the city or township, in which the property, or any part thereof, is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county; and notices of such sale shall be posted complying with the laws governing sales under execution, and may from time to time, for one day or several days, postpone such sale by publication, by republishing the notice of sale in the same newspaper, with the date of the postponement attached thereto, in one issue only, prior to the day of the postponed sale; and on the day of sale so advertised, or any day to which such sale may be postponed, said party of the second part, or its

successors or assigns, may sell the property so advertised, the whole or any part thereof, at public auction, in the City of Los Angeles, California, to the highest bidder; and the holder or holders of said promissory note, ...h..... agents or assigns, may bid and purchase at such sale.

And the party of the second part, its successors or assigns, may establish as one of the conditions of such sale that all bids and payments for the said property shall be made in like gold coin as aforesaid, and upon such sale shall make, execute, and after due payment made, deliver to the purchaser or purchasers, or .....h..... heirs or assigns, a deed or deeds of grant, or a deed in any form it may select, conveying so much of the above granted property as is sold, and out of the proceeds thereof shall pay:

FIRST: The expenses thereof, together with all the expenses of these trusts, including counsel fees, all advances made, and interest on any of the payments aforesaid.

SECOND: All sums which may have been paid by the said party of the second part, its successors or assigns, or the holders of the note..... aforesaid, and not reimbursed, whether paid on account of incumbrances or insurance as aforesaid, or in the performance of any of the trusts herein created, and whatever interest may have accrued thereon, then the principal and interest unpaid upon said promissory note....., and any additional sums advanced and interest thereon, and lastly the balance or surplus of such proceeds, if any, to said part..... of the first part, its heirs or assigns. If a sale is made at the request of the holder of the note..... secured by the Deed of Trust, the Trustee shall not be liable to any person claiming to own any part of the indebtedness secured by said Deed of Trust.

AND in the event of the sale of said property or any part thereof, and the execution of a deed or deeds therefor under these trusts, then the recitals therein of default; that the beneficiary or holder of the note had given notice of the default and election to sell the described premises under the powers of the deed of trust, to satisfy the debt; that said notice was duly recorded in the office of the County Re-

corder for three months prior to the notice of sale, due publication of the notice of sale, due and proper posting of the notice of sale, and also publication of notice of postponement, if the sale was postponed; that the sale was made to the highest bidder; that the purchase-money was paid; and any such deed or deeds with such recitals shall be effectual and conclusive, as against the said part..... of the first part, its successors or assigns, and all other persons; and the recital of the receipt of the purchase-money contained in any deed executed to the purchaser, as aforesaid, shall be a sufficient discharge to such purchaser from any obligation to see to the proper application of the purchase-money, according to the trusts provided in this Instrument.

The TITLE GUARANTEE AND TRUST COMPANY does accept the Trust herein, when this Deed of Trust is executed, duly acknowledged and delivered. This company does insist that the holder of the Note..... described as secured hereby, shall care for and keep this Deed of Trust with the Note..... hereby secured, and this Trustee does hereby renounce all liability to the holder of any Note..... hereby secured, unless the same person also holds the Deed of Trust. The Note..... hereby secured, accompanied with the Deed of Trust duly recorded, may be registered at the Company's office.

In Testimony Whereof Paramount Motors Corporation of the Pacific, a corporation, has caused this deed to be duly executed, the name of the corporation being signed by its Vice-President and attested by its Secretary, with the corporation seal, the day and year first above written.

(SEAL) PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC
By S. S. SMITH, *Vice-President.*

Attest: CHAS. H. NORTON, *Secretary.*

STATE OF CALIFORNIA,
County of Los Angeles—ss.

On this 4th day of Dec. in the year one thousand nine hundred and 24 before me, A. G. McElhinney, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly com-

missioned and qualified, personally appeared S. S. Smith, known to me to be the Vice-President, and Chas. H. Norton, known to me to be the Secretary of Paramount Motors Corporation of Pacific, the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official Seal, the day and year in this Certificate above written.

(SEAL) A. G. McELHINNEY,
Notary Public in and for Los Angeles County, State of California. My commission expires Nov. 6, 1927.

Order No. 1667. When recorded, please mail this Instrument to T. H. Walker, Suite 614, 714 So. Hill St., City. COMPARED. Read by ANDERSON. Document L. C. BROWN. RECORDED Dec. 17, 1924. Min Past 8 p.m. In Book 3501, at Page 373, of Official Records, Los Angeles County, Cal. C. L. Logan, County Recorder. I hereby certify that I have correctly transcribed this document in above mentioned book. L. P. Curtis, Copyist, County Recorder's Office, L. A. Co., Cal.

(Endorsed): Filed April 7th, 1927. R. S. Zimmerman, Clerk; By Frances E. Cross, Deputy Clerk.

PLAINTIFF'S EXHIBIT 9

(Tr. pp. 68-70):

ASSIGNMENT

In consideration of the purchase by the Mortgage Corporation of America of the First Trust Deed in the amount of Twelve Thousand Five Hundred ($12,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific, the Theron Walker Engineering & Construction Company hereby assigns, sets over and transfers to the Mortgage Corporation of America, all of its right, title and interest in and to the proceeds of a certain assignment made in its favor and calling for the payment to it of the sum of Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars, due for im-

provements on account of trust No. 243 with the said Bank of America, with the exception of the sum of Four Thousand Five Hundred ($4,500.00) Dollars, which is first to be deducted from the amount of Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars and made payable in favor of the Second Trust Deed of Four Thousand Five Hundred ($4,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific in favor of H. E. Seaton. A copy of the assignment, which original is now in the hands of the Bank of America, is given below.

Los Angeles, Calif.
Dec. 4, 1924.

"Bank of America,
Los Angeles, California. TRUST #243
Gentlemen:

You are hereby authorized, directed and instructed to pay up to, and no more, $11,965.00 due for improvements, as per attached documents, on Paramount Heights, Azusa, California, Tract No. 8507, to Theron Walker Engineering & Construction Company, as assigns of Paramount Motors Corporation of the Pacific, taking proper receipt therefor, out of any and all improvement funds coming to you and payable therefrom under Bank of America Trust #243, at the rate of FORTY (40%) PER CENT of said funds, or any amount thereunder, that may come to you and be payable from improvement funds under said Trust #243, beginning on the first day of February, 1925; payment to be made to said Theron Walker Engineering & Construction Company, on the first day of each month, as they may indicate to you, of any improvement funds paid to you and payable to you for the preceding month, until, and not longer, said amount of $11,965.00 shall have been so paid.

(Signed) L. W. COFFEE
Agent Beneficiary under Trust #243.

This will be authority to the Bank of America, as Trustee, to make all payments under the above order to the Mortgage Corporation of America, owner of said Twelve Thousand Five Hundred

($12,500.00) Dollar trust deed until it shall have received from the Bank of America full amount of said assignment, less such amount as has been paid on the second trust deed.

IN WITNESS WHEREOF, said Theron Walker Engineering and Construction Company, has hereunto affixed its name.

THERON WALKER ENGINEERING AND CONSTRUCTION COMPANY
By Theron Walker.

TRUSTEE'S ENDORSEMENT

The foregoing Trust is hereby accepted and the duplicate of this assignment filed in the Trust Department of the Bank of America this 21st day of October, 1925.

BANK OF AMERICA,
By C. N. CLUTE,
Assistant Trust Officer.

DEFENDANTS' EXHIBIT A

November 29, 1924.

For value received, being loan to this corporation of $17000, this day for building of factory at Paramount Heights, Azusa, California, the Paramount Motors Corporation of the Pacific, hereby sells, assigns and transfers to Theron Walker Engineering & Construction Co., the following accounts, being monies advanced by this corporation for improvements at Paramount Heights, Azusa, California, and payable from improvement funds under Trust #243, Bank of America:

Improvement advances Acct #1	$10,994.85
Improvement advances Acct #2	970.15
Total	$11,965.00

It being understood that all or any portion of said amount *when* paid to Theron Walker Engineering & Construction Co. shall become a credit on the principal and interest of said aforementioned loan.

(SEAL) PARAMOUNT MOTORS CORPORATION OF THE PACIFIC
S. S. SMITH, *Vice-President.*
N. E. BLISS, *Treasurer.*

(Endorsed): Filed April 7, 1927. R. S. Zimmerman, Clerk; By Francis E. Cross, Deputy Clerk.

DEFENDANTS' EXHIBIT C

OWNER'S OFFSET STATEMENT

Los Angeles, California, December 18, 1924.

UNION BANK & TRUST CO.
of Los Angeles

Gentlemen:

In reply to your request of recent date, will say that I am the maker of the certain promissory note dated December 1, 1924, made in favor of H. E. Seaton and secured by a Trust Deed recorded in Book....., Page..... of Official Records of Los Angeles County, and covering a certain 20.00 Acre Parcel—East and West Center Line of which is the Center Line of Paramount Street; a portion of Lots 11 and 12, Subdivision No. 2, Azusa Land and Water Company, as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, California.

THAT I am the owner of the premises covered by the said Trust Deed;

THAT the unpaid balance of the note secured by the said Trust Deed is $12,500.00;

THAT the interest on said notes has not been paid at the net rate to not paid;

THAT the so-called net rate of interest is 8% per annum;

THAT I have no offsets, claims nor defense against said note except as stated above.

I understand that the said note and Trust Deed have been assigned and that the new owner's name and address is Mortgage Corporation of America, 310 Union Bank Bldg., Los Angeles, California.

(SEAL) PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC
CHAS. H. NORTON, *Secy.*

Name Phone Address

The above is correct.

H. E. SEATON.

By THERON WALKER ENGINEERING
& CONSTRUCTION CO.
THERON WALKER.

(Endorsed): Filed April 7, 1927. R. S. Zimmerman, Clerk; By Francis E. Cross, Deputy Clerk.

DEFENDANT'S EXHIBIT E
NOTICE OF COMPLETION

STATE OF CALIFORNIA,
County of Los Angeles—ss.

Paramount Motors Corporation of the Pacific, being first duly sworn, deposes and says: that it is now, and was upon the 7th day of December, 1924, the owner in fee simple of that certain real property situated in the City of Azusa, County of Los Angeles, State of California, and particularly described as follows, to-wit:

20 acre parcel east and west center line of which is the center line of Paramount Street, a portion of lots 11 and 12, subdivision #2, Azusa Land and Water Company as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, as per map recorded in Book 43, page 94, of Miscellaneous Records in the office of the County Recorder of said County.

THAT as such owner of said land, affiant, about the 28th day of November, 1924, entered into a contract with Theron Walker Engineering & Construction Company of Los Angeles, California for the erection and construction, upon the land above described, of certain building, to-wit:

A one-story factory building of brick construction.

THAT said building has been duly constructed in accordance with the plans and specifications and the same was actually completed on the 31st day of January, 1925.

THIS notice is given in pursuance of the provisions of Section 1187 of the code of Civil Procedure of this State.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC
R. E. CLAPP,
Managing Director.

SUBSCRIBED AND SWORN to before me this 31st day of Jan'y. 1925.

(SEAL) MABEL C. KIRKSEY,

Notary Public in and for said County and State. (Compared) Document, Crowell; Book..... Zimmerman. Recorded Feb. 9, 1925, 42 Min. 10 a. m., in Book 3814 at Page 299 of Official Records, Los Angeles County, Cal., C. L. Logan, County Recorder.

I certify that I have correctly transcribed this document in above mentioned book. N. Howland, #126, Copyist, County Recorder's Office, L. A. Co., Cal.

(Endorsed): Filed April 7, 1927. R. S. Zimmermen, Clerk; By Francis E. Cross, Deputy Clerk.

DEFENDANTS' EXHIBIT F

Transcript Pages 4 to 31

DECLARATION OF TRUST

No. 243

KNOW ALL MEN BY THESE PRESENTS, that BANK OF AMERICA, a Corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California, hereinafter sometimes called "Trustee" has received a deed, dated July 3rd, 1924, executed by D. CORNELIUS SMITH, (and Bertha A. Smith, his wife, who by her signature hereto disclaims any interest herein or in or to the property covered hereby or the proceeds of the sale thereof), hereinafter designated "Trustor" and filed for record August 2, 1924, purporting to convey to the BANK OF AMERICA that certain real property situated in the City of Azusa, County of Los Angeles, State of California, described as follows:

Lots Eleven (11), Twelve (12), Twenty-six (26) and Twenty-seven (27) of Subdivision No. 2 of the Azusa Land and Water Company, in the County of Los Angeles, State of California, as per map recorded in Book 43, page 94 Miscellaneous Records of Los Angeles County, except the northerly Fifty (50) feet thereof.

SUBJECT TO:

Conditions, Restrictions, Reservations, limitations and easements of record, if any, and taxes for the fiscal year 1924-1925 (condition of title received subject to such matters of record as

appear in guarantee to come and to be considered and acted upon as though the same had been inserted herein in full).

And Whereas, Fred S. Lack, hereinafter designated "Beneficiary" has purchased from the Trustor, the aforesaid property for the purpose of the subdivision and sale of a portion thereof, to-wit:

The East One Hundred (E 100) Acres thereof, and from the proceeds of the sale thereof, to set aside Two Hundred and Forty Thousand ($240,000.00) Dollars, in cash, and/or contracts of sale of the property covered under said subdivision, for the purpose of the creation and installation of a manufacturing plant at Azusa, California, on said property for the Paramount Motors Corporation of the Pacific, a corporation of the State of Delaware, with its principal place of business in California, located at Los Angeles, California.

The said funds, if, as, and when accumulated therefor, from the sale of lots in said subdivision, to be deposited, together with a monthly statement of the accounts of said Trust, with the First National Bank of Azusa, California, the said funds as and when received by the said First National Bank of Azusa, to be deposited in a joint account of said Trustor and said Paramount Motors Corporation of the Pacific, and subject to be withdrawn only under their joint signatures,

And Whereas, the said Beneficary has advanced funds in the matter of the purchase of this Trust property, in the sum of Ten Thousand ($10,000.00) Dollars, which the Trustor desires that the Beneficiary receive prior to the setting aside of any of the funds hereunder,

And Whereas, no consideration has been paid by the Trustee for the conveying to it of said property other than the terms and conditions hereof,

Now, Therefore, said Trustee does hereby certify and declare that it holds and will hold the property covered hereby in Trust under the terms and conditions and for the uses and purposes set forth in this Declaration of Trust.

ARTICLE I.

Scope of Trust.

1. To secure the payment to the Trustee of its fees, commissions, expenses, advances, under the terms of this Declaration of Trust.

2. To secure the accumulation of the Two Hundred Forty Thousand ($240,000.00) Dollars in cash and/or contracts on behalf of said Paramount Motors Corporation of the Pacific as herein provided.

3. To subdivide and/or convey the said property in lots or parcels as hereinafter provided.

ARTICLE II.

Duties of Trustee.

The Trustee agrees for the purpose of carrying out the provisions of this Trust, to do and perform the following acts:

1. The Trustee agrees to subscribe to a subdivision map or maps of said property, or any portion thereof, when and as requested so to do by the said Beneficiary, and upon such subdivision, the Trustee shall convey said property to the purchaser or purchasers thereof, at such prices and upon such terms of sale as it may be directed to do by the said Beneficiary as hereinafter provided.

Except, that until all of the Two Hundred and Forty Thousand ($240.000.00) Dollars in cash or contracts of sale, has been fully accumulated, no conveyance or contracts of sale shall be made or any property sold at a less price than those contained in a schedule of sales prices, a copy of which schedule is hereto attached, hereby referred to, marked "Exhibit A" and made a part hereof as though herein fully set out.

Provided, that until the accumulation of the aforesaid Two Hundred and Forty Thousand ($240,-000.00) Dollars in cash and/or contracts of sale, no sale shall be made on any less favorable terms than 20% of the actual sales price, in cash, on the date of sale, and the balance of the actual sales price at the rate of not less than 2% per month.

Provided, that the payment may be made monthly, quarterly, or semi-annually.

Provided, further, that not less than 24% of the actual sales price shall be payable on deferred pay-

ments in each year, and payments shall not extend over a period of more than four (4) years, together with interest on all deferred payments at the rate of 7% per annum, payable either monthly, quarterly, or semi-annually. Interest optional with the beneficiary.

2. Said conveyance or contracts of sale shall contain such conditions, restrictions, reservations, limitations, ways and rights of way and easements as may be specified by the Beneficiary, acceptable to the Trustee, but any conveyance made by the Trustee shall vest in its Grantee a good and sufficient title, from and discharged of the trusts herein and without any obligation on the part of the purchaser to see to the application of the purchase money, and further, each conveyance shall, without liability therefor or the legality thereof by the Trustee, contain a condition subsequent expressly providing that no rock, sand or gravel shall ever be excavated or removed from said premises, or any part thereof, for sale or other commercial purposes. It being an express condition of this Trust that all contracts and deeds shall contain therein a provision that the Trustee is not nor shall it in any way be liable for or to make any improvements on said property.

3. It shall receive, receipt for and distribute all the proceeds of all sales and the collections on all contracts of sale on the respective parts or portions of the demised property in accordance with the terms of this Trust.

4. It shall, upon the written instruction of the Trustor, proceed by suit or otherwise, in the enforcement of the terms, conditions and penalties, including the cancellation by default by acts or suit of the various and several contracts to be executed by it upon the written direction and instruction of the said Beneficiary, the costs and expenses of which shall be borne by the Trust and chargeable to the Beneficiary.

Provided, that the Trustee, before enforcing the terms, conditions, and penalties and/or cancellation of any contract, may, at its discretion, require from the Beneficiary, or his successors and assigns, in-

demnity in such sum or sums as the Trustee in its discretion may require.

Provided, that in the event there are insufficient funds available in the Trust for the payment of expenses and/or liabilities on account thereof, the Trustee may in its discretion, require the Beneficiary to deposit in the Trust for said purposes, by advancement or otherwise, such funds as in its discretion, it deems necessary therefor.

4. It shall execute contracts of sale or deeds to the individual parts or portions or for the whole of said demised premises, in such form and upon such terms and conditions as are herein specified, and as may be specified by the Beneficiary.

Provided, the form and conditions and the terms of said contract and deeds shall be at all times satisfactory to the Trustee, and

Provided, that not more than one lot or parcel shall be included in any one contract.

Any assignment of any contract by the holder thereof may be accepted by the Trustee, and such acceptance shall be without liability therefor on the part of the Trustee or to ascertain the rightful owner thereof.

ARTICLE III.

Duties of Beneficiary.

The Beneficiary shall, upon the execution hereof, cause to be prepared a map of the survey of the Easterly One Hundred (100) Acres of said aforesaid properties, which shall be executed and acknowledged by the said Trustee and filed for record in the office of the County Recorder of said County of Los Angeles.

Said Trustee being hereby authorized to dedicate to public use, all streets, alleys and parks shown on said map.

That he will immediately, thereafter, cause the said property to be improved, all costs and expenses incident to said re-subdivision and all improvements shall be borne solely by the Beneficiary hereunder and no part thereof shall be borne by the said Trustee.

IT IS EXPRESSLY UNDERSTOOD AND AGREED, however, that before any lot in the aforesaid subdivision,

or any other subdivision of the aforesaid property, is offered for sale under the provisions of this instrument, said Beneficiary shall furnish to said Trustee a written statement of the following:

1. The representations and/or inducements which are to be made to buyers of the trust property, relative to the improvements in, on and about said property.
2. The general improvements to be made in or on said trust property, with reference to grading, filling, leveling, storm drains, etc.
3. The improvements to be installed in the streets now included in and/or adjoining the trust property, or in the streets which may be dedicated hereafter under the re-subdivision of the trust property, with reference to surfacing of streets, installation of sidewalks, curbs, gas, electricity, water, etc.

which statement shall be accompanied by an estimate from a reliable contractor and engineer of all costs and expenses of all costs and expenses of said improvements.

Said Beneficiary does hereby promise and agree to protect and save harmless the said Trustee and the lands covered hereby from all loss, damage or liability by reason of the aforesaid subdivision and/or improvements whatsoever of the trust property and likewise promises and agrees to furnish said Trustee, without demand therefor, such guarantee and indemnity as said Trustee shall deem necessary to protect said Trustee and the land covered hereby from all loss, damage, liability and expenses by reason of said subdivision or subdivisions, and all said improvements or any of them.

That said Beneficiary, by his signature hereto, does hereby promise and agree as follows:

(a) To PAY, before delinquency, all taxes and assessments levied and assessed against the property covered hereby, and/or against the debts secured hereunder, during the life of this Trust.

(b) To PAY, when due, all other claims, liens, and encumbrances affecting or purporting to effect the title to the property covered hereby, and all costs, charges, interest and penalties on account

thereof; also all costs, fees, and expenses hereunder of the Trustee and of this Trust.

(c) To Defend or Cause to be Defended, any action or proceeding affecting or purporting to affect the property covered hereby, this Trust or the rights of either the Trustee or the Trustor hereunder; and to pay all costs and expenses of any such action or proceeding together with attorney's fees in a reasonable sum to be fixed by the Court whether any such action or proceeding progress to judgment or not, and whether brought by or against the Trustee or the Payee hereunder.

(d) To Protect, Preserve and Defend the property covered hereby and the title thereto, and to keep said property in good condition, by proper care, inspection, repair, cultivation, irrigation, fertilization or otherwise, and to permit no waste or deterioration thereof.

(e) Within sixty (60) days from the consummation of the first sale made under the provisions of this instrument, to COMMENCE and thereafter continuously to prosecute with due diligence, the INSTALLATION of and within twelve (12) months (or such extension, if any, thereof as may be granted by said Trustee) from date of such commencement, to complete all subdivision and improvement work hereinbefore mentioned intended to be made of property covered hereby; and to protect and save harmless by reason thereof said Trustee and all lands herein described.

(f) To Repay, within thirty (30) days from date of advancement and without demand therefor, all sums advanced or expended by the Trustee under the terms hereof (see following paragraph) with interest thereon from date of advancement until repaid at the rate of seven per cent (7%) per annum.

It is Understood and Agreed, that should said Beneficiary

(1) Fail or refuse to make any payment or payments or to do any act or acts hereinbefore in foregoing paragraphs (a) to (f), both inclusive, mentioned, in the manner and at the time therein provided—

(2) And/or fail or refuse to commence the installation of all hereinbefore mentioned improvements intended to be made, of property covered hereby within the time hereinbefore fixed,

(3) And/or fail or refuse to complete the installation of such improvements within the time also hereinbefore fixed,

then said Trustee hereunder, without notice to any one, may make or do the same in such manner and to such extent as they or either of them may elect, and to that end, said Trustee may enter and take possession of said Trust property at such times or time and for such period or periods as it may deem necessary and/or proper; and said Trustee may pay, purchase, contest or compromise any claims, liens, or encumbrances which, in its judgment, appear to affect property covered hereby or this Trust, and may advance money or moneys, from time to time, for any payment or purpose whatsoever in connection with this Trust.

INCLUDING, the right and power on the part of said Trustee to cause the aforesaid improvements (including re-subdivision) to be made of the trust property, in such manner, to such extent, and at such time or times after the expiration of the time hereinbefore fixed for the completion of said improvements as said Trustee may deem necessary therefor; and each and every sum so advanced shall be a first lien upon, and be secured by, the entire beneficial interest under this Trust PRIOR AND SUPERIOR to any Debt now or hereafter secured hereby, each such advancement to be an obligation of the Beneficiary hereunder and to be repaid to the Trustee on or before thirty (30) days from the date of such advancement, together with interest thereon from date of advancement until repaid at the rate of seven per cent (7%) per annum, payable quarterly.

IT IS EXPRESSLY UNDERSTOOD, however, that said Trustee shall be under no obligations whatsoever, to perform any act or to make any payment or advancement above mentioned.

IT IS UNDERSTOOD AND AGREED that in the sale of any property under the release prices as set out in the aforesaid schedule marked Exhibit "A" a dis-

count of 5% may be allowed under any sale or sales made for cash,

PROVIDED, that the Trustee is hereby authorized and directed to pay from the moneys received, commission to the agent or agents of the Beneficiary as hereinafter set out, and to set aside an improvement fund for the improvement of said property and to be paid out upon the receipted bills of the contractor, the signature of the engineer and approval of the Beneficiary, all bills for improvements, if, as and when funds are available therefor.

PROVIDED, that nothing herein shall be taken in any way to obligate the Trustee to advance or become liable for the payment of any moneys provided to be paid under the provision of this Trust.

ARTICLE IV.

Conditions

1. During the term of this Trust, said Trustee shall not be required to procure or maintain any insurance upon any buildings on said property, or to pay or secure the payment or any liens, encumbrances, taxes, assessments or other charges against said property, or to collect or disburse any rentals therefrom, or protect or perfect any title it may have thereto, or in any other respect to care for, maintain and protect the trust estate or this Trust against any legal and/or equitable attack unless and until requested so to do in writing by the said Beneficiary, accompanied by a sum of money and/or at the option of the Trustee, indemnity of such character and amount as shall in the judgment of said Trustee, be adequate and sufficient to pay or protect it against all costs, charges, expenses and liabilities expended or incurred in connection therewith, unless and until so requested in writing and so furnished with such money or indemnity, all responsibilities towards said property and this Trust shall rest solely and exclusively upon the other parties hereto and not upon the said Trustee.

The Trustee herein shall not be required to make settlement hereunder any oftener than once each month and when such settlements are so made, the

same shall be as of the 15th day of the calendar month.

2. Said Trustee shall not be answerable or responsible for the validity of the conveyance to it of any property or for the value thereof or title thereto, nor for any easements, encumbrances, restrictions, or other limitations thereon or claims thereto, but the sole, only and exclusive liability of said Trustee shall be to convey the aforesaid property upon the written request of the said Beneficiary as herein provided, and then only to convey such title thereto as shall actually have been conveyed to it and by it accepted in trust herein, and/or which the said Beneficiary may be able to maintain or perfect in said Trustee for the purposes of this Trust, and not otherwise.

No sale or transfer of any interest herein shall be valid or binding upon said Trustee unless and until the executed duplicate copy of the assignment thereof shall have been first delivered to and accepted by the said Trustee for the purposes of transfer, except where such interest may pass or be transferred by final decree and/or order of court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee, and no contracts of purchase or sale shall be executed or assigned in any way which will involve the Trustee in the recognition thereof.

If the whole or any of the property herein described, or the proceeds or avails thereof, shall, at any time during the term hereof, or upon the expiraton of this Trust, become liable for payment of any estate, inheritance, income, or other tax, charge or assessment, which said Trustee shall be required to pay, then, unless such taxes shall have been fully paid when due by some one else, said Trustee is hereby authorized, at its option, without previous notice to or demand upon any person, to pay such taxes out of the whole, or any portion of the property then subject to this Trust, and for that purpose is hereby generally and specifically authorized, and empowered, without previous notice or demand, to or from any person whomsoever, to sell at public or private sale, and convey sufficient portion of the trust estate, up to and including the whole thereof

as shall fully pay all such taxes, all costs and expenses of such sale; all the sums, together with interest thereon at seven per cent (7%) per annum, payable quarterly when due, to the Trustee under this Trust, or which it may have advanced or expended in the care, management and/or protection of the trust estate, and in the payment of any said estate, inheritance, income or other taxes levied upon or collectible from the trust estate, or on behalf of any one interest therein, and which said Trustee may be required to pay, shall constitute a first lien on all the property subject to this Trust and in favor of said Trustee.

It is hereby expressly understood and agreed by all parties hereto that the said Beneficiary shall at all times hereunder pay all taxes as and when they become due, and keep the property free from all liens or assessments by reason of any improvements placed thereon. The Trustee shall within ten (10) days after the inception of any work or improvements on the demised premises under aforesaid subdivision, or otherwise, when notice thereof and demand in writing has been given to said Trustee by the Beneficiary, and funds are available therefor, post notice of non-responsibility upon said property and record the same as required under Section 1192 of the Code of Civil Procedure.

4. The Trustee shall not be required to advance any moneys to or incur any personal liability in or about the protection of the Trust property, or in respect to any of the contracts to be made by it hereunder, (except for the liability to account for money coming into its hands) as herein contemplated, and any advancements herein provided to be made by the Trustee and any personal obligations which it may hereunder incur for advancements out of its personal or private funds, shall be at all times taken as being optional and in no respect obligatory.

5. The Trustee hereunder shall be entitled, in the event of any action being brought by or against the Trustee herein by reason hereof, or for the enforcement of contracts executed provisional to this Trust, to select and nominate any reputable attorney

to represent the Trustee, provided that whenever any action is brought or defended pursuant to this Trust in the name of the Trustee, the Trustee, before bringing or defending such action or authorizing its name to be used therein, shall be entitled to require of the Beneficiary reasonable and satisfactory security to protect it against costs or liabilities incurred in or about such action.

6. The Trustee shall not be liable to the parties hereto, or otherwise, for the misconduct, malfeasance, or misappropriation of any attorney, agent, or representative selected by it for carrying out the provisions of this Trust, whether upon request of the said parties to this Trust, or otherwise, except where such agent or attorney may act upon the express authorization of the Trustee outside of the terms of the contracts authorized hereby.

7. The Beneficiary does hereby bind himself, to pay, as and when due, taxes or other obligations provided for herein to be paid for by said Beneficiary, and also any advancements made for the benefit of the Beneficiary for the purposes hereof, or for the benefit of the demised premises, including the fees, expenses and charges of the Trustee, for acting hereunder, immediately and upon demand made by the Trustee, together with interest, if any, accrued thereon, unless the equivalent thereof is available therefor in the hands of the Trustee.

ARTICLE V

Distribution of Funds

All moneys received hereunder from the sale of a lot or lots under the subdivision of the aforesaid property, or properties, or parcels held hereunder, shall, by the Trustee, be distributed as follows:

First: The first moneys received shall be applied to the costs, fees, expenses, damages, and advances, if any, with interest hereunder, of said Trustee.

Second: The next moneys received hereunder shall be applied to the payment of the commissions as herein provided to the agent making a sale, of 10% of the actual gross sales price of each lot covered by such sale, and payable out of the first twenty per cent (20%) of the principal received from said sale, said 10% being a part of the agent's commis-

sion as herein provided for, and in addition to, and not included in, the additional money payable on account of commissions as hereinafter mentioned.

Provided, that the said agent shall receive five per cent (5%) of the actual gross sales price on each lot covered by said sale in addition to the aforesaid 10%, but which 5% shall be paid from the first twenty (20%) per cent of the principal.

PROVIDED, HOWEVER, that said 5% shall be a charge against and offset to the extent thereof against the proportion of the net proceeds as hereinafter provided to which said agent would be entitled under the provisions of this Trust.

AND FURTHER PROVIDED, that twenty-five per cent (25%) or balance of the said 20% shall be set aside in an improvement fund.

Then, and thereafter, all moneys received, shall be applied:

1. To the payment of said Fred S. Lack of Ten Thousand ($10,000.00) Dollars, together with interest thereon from the date hereof until paid at the rate of 7% per annum.

2. Any part of all remaining money received may be applied if found necessary to pay accounts due for improvements on said property up to but not in excess of Eighty Thousand Dollars ($80,000.00).

3. Then, and thereafter, all moneys, if as, and when received, less the aforesaid costs, fees, expenses, damages and advances of the Trustee, with interest, shall be paid to the First National Bank of Azusa, California, to the credit of the Paramount Motors Corporation of the Pacific, until there shall have been accumulated therein, the sum of Two Hundred and Forty Thousand ($240,000.00) Dollars in cash and/or lot sales contracts in this Trust. (It is a condition of this Trust as between the Trustor and Beneficiary that none of the aforesaid funds so deposited with First National Bank of Azusa, California, shall be withdrawn or expended by the said Paramount Motors Corporation of the Pacific, other than for the purpose of building a factory building for said corporation on a portion of the aforesaid sixty acres; and, withdrawals from

said account shall only be upon the joint signatures of the Trustor hereunder and the proper officers of said Paramount Motors Corporation of the Pacific, but the Trustee is not nor shall it at any time be liable therefor, concerned therewith or in any way compelled to look to the application of said funds.

4. Then, and thereafter, and after the deduction of all of the aforesaid allowances, the remaining portions of the proceeds of said sales shall be distributed subject to the order of the Beneficiary.

Provided, that after there shall have been a total distribution hereunder of the sum of Three Hundred and Fifty Thousand ($350,000.00) Dollars, plus the aforesaid additional 5% as provided to be paid to Agents from the down payment on account of sales, less the then aggregate expenses of this Trust, the balance shall be distributed—50% thereof plus interest collected to the beneficiary and 50% thereof (exclusive of interest, which shall belong to the Beneficiary) to the agent or agents who have, at the date of the distribution thereof, made sales under this Trust, in the proportion that the gross amount of the sales made by each individual agent bears to the entire sales under said subdivision.

Provided, however, that the agent or agents appointed hereunder shall be without right, title or interest in any additional or further commissions or account of the distribution of the aforesaid net distribution of this Trust unless the said gross moneys collected under said subdivision shall total in excess of Three Hundred and Fifty Thousand ($350,000.00) Dollars or before three (3) years from the date hereof.

5. All interest collected on sales under the subdivision of the aforesaid property shall be set aside to the improvement fund and distributed thereunder, after payment for the improvements, all interest and the refund from the improvement fund of the interest thus used shall be paid to the beneficiary.

6. All moneys placed in the improvement fund by virtue of the aforesaid distribution, as provided in Article V of this Trust, is hereby designated and set aside for improvement and expenses under this

Trust, and the distribution of moneys in this fund, at any time and from time to time, shall be made by the Trustee as follows:

First: To the payment of, the unpaid costs, fees, expenses, damages and advances, if any, with interest hereunder of said Trustee,

Second: To the payment at the sole discretion of the said Trustee, of taxes, assessments, etc., levied against the Trust property.

Provided, that the Trustee shall not, in any event, be liable for non-payment of either or any thereof, caused by the shortage of money in said fund required therefor.

Third: To the payment of such bills for the subdivision and improvement of the aforesaid One Hundred (100) Acres, as shall have been presented therefor to the said Trustee, receipts by the contractor, certified by the engineer to be correct as to the actual furnishing of labor and material, and the completion of the particular item therein referred to, and the approval of the Beneficiary as herein above provided.

Provided, that the Trustee shall not be required to make any expenditure of said funds for said improvements unless said expenditure is supported by the verified statement of the then agent for the Beneficiary; said Trustee, however, in no event to be liable for the nature and/or authenticity of said bills or either or any of them, or for said certification.

ARTICLE VI

IT IS UNDERSTOOD AND AGREED that it is the purpose of this Trust to accumulate and pay into the First National Bank of Azusa, the sum of Two Hundred and Forty Thousand ($240,000.00) Dollars, the same to be credited, as and when accumulated, and thus deposited, to the credit of a special savings account therein as above provided, and to be withdrawn therefrom only upon the order of the parties thereto, as provided in paragraph "3," Article "V" on page 13 hereof.

IT BEING EXPRESSLY UNDERSTOOD AND AGREED, however, that when there shall

have been accumulated within said account in the First National Bank of Azusa, or funds deposited in said Bank to the credit of the Paramount Motors Corporation of the Pacific, under a depository on the sale of stock, whether the same shall have been released to the subscribers, or not, and contracts of sale in the hands of the Trustee, all of which sums shall equal the sum of Two Hundred and Forty Thousand ($240,000.00) Dollars;

Provided the same shall have been thus accumulated on or before the first day of February, 1926.

Then, and thereafter, said D. Cornelius Smith, Trustor, shall be without further right, title or interest in or under this Trust, or in or to the property covered hereby, and/or the proceeds or avails thereof.

Provided further, however, that if the same shall not have thus been accumulated on or before the first day of February, 1926.

Then, and in that event, the Trustee shall, and it is hereby authorized and directed, on the 2nd day of February, 1926, to execute and convey to the said D. Cornelius Smith, Trustor, forty (40) acres, more or less of the remaining 60 acres, more or less, remaining in the unsubdivided portion in the above properties purported to have been conveyed to the Trustee hereunder, said properties being represented to contain One Hundred and Sixty (160) acres, more or less.

Provided, that said property is then a portion of this Trust, and in the event that the aforesaid Two Hundred and Forty Thousand ($240,000.00) Dollars, in deposits and contracts, shall have been thus accumulated, on or before the said first day of February, 1926;

Then, and in that event, the Trustee shall thereupon convey and deed to the Paramount Motors Corporation of the Pacific, the aforesaid forty (40) acres, without demand.

Provided further, however, that twenty (20) acres of the aforesaid sixty (60) acres, may, at any time be conveyed from under this Trust upon the joint order of the Trustor and Beneficiary, the proceeds of the sale thereof to be paid over to the Trustee

and deposited to the credit of the aforesaid account in the First National Bank of Azusa in the accumulation of the aforesaid Two Hundred and Forty Thousand ($240,000.00) Dollars, the said Two Hundred and Forty Thousand ($240,000.00) Dollars to be thus accumulated shall be without interest, but the proceeds of sales exclusive of interest collected under this Trust shall be so deposited in said account until the said Two Hundred and Forty Thousand ($240,000.00) Dollars shall have been accumulated therein from said sales.

ARTICLE VII

Agent of Beneficiary

The Beneficiary may, from time to time, appoint an agent to represent the Beneficiary in the matter of the subdivision and sale of said property, to which agent the Trustee is authorized and directed to pay the commissions on sales herein provided for as, and when, the funds are available therefor in accordance herewith.

Said Beneficiary hereby designating and appointing as his first agent in respect hereto, L. W. COFFEE, of Azusa, California.

Provided, that said Agent shall, by his signature hereto, accept said agency and recognize hereby the reservation in the said Beneficiary of the full power and authority to cancel this appointment by filing with the Trustee a written cancellation of this appointment and the designation of a successor agent on behalf of the Beneficiary in respect hereto, and then, and thereafter, said former agent shall be without further interest herein, except that the Trustee shall account to said retiring agent for the moneys to which he is entitled to hereunder in respect to sales therefore consummated and each succeeding agent shall accept the appointment in writing in accordance with the provisions hereof, and the appointment shall not be effective as to such succeeding agent until such written acceptance has been filed with the Trustee.

ARTICLE VIII

Compensation of Trustee

The COSTS, FEES, and EXPENSES hereunder of said Trustee are hereby fixed as follows:

(A) Usual expenses of preparing and executing instruments and obtaining guarantee showing title to real property covered hereby vested in said Trustee, together with expenses of internal revenue or such other tax as may be imposed by law upon instruments necessary for the execution hereunder.

Also proper compensation for preparing income or other tax reports required by law.

(B) Three Hundred Dollars ($300.00) for accepting this Trust and executing this Declaration.

(C) Minimum annual fee of Three Hundred ($300.00) Dollars for each year or fraction of a year during the life of this Trust.

(D) 3% on all moneys handled by the Trustee, provided that in any year in which the 3% collected on moneys handled during such years by the Trustee, exceeds the sum of Three Hundred ($300.00) Dollars, no annual fee shall be charged for said year.

(E) $2.50 for each instrument executed by said Trustee, and for each assignment accepted or received.

(F) 25c for each check issued by the Trustee.

(G) Closing Fee of Five Hundred ($500.00) Dollars.

Reasonable compensation for any and all services rendered by said Trustee in the execution of this Trust for which the costs, fees, and expenses are not herein provided for, including reasonable compensation (in addition to counsel fees and other expenses) for any service rendered under this Trust by said Trustee in connection with any action or proceeding at law), (by reason of the death of any of the parties hereto), or in paying or attending to the payment of any taxes or assessments or in connection with any income tax, inheritance tax, or estate tax matter affecting the Trustee or any trust property or any portion thereof.

ARTICLE IX

THIS TRUST shall not cease nor terminate in any event until all of the costs, fees, expenses and advances, with interest hereunder, of said Trustee, and all liabilities and damages incurred or sustained by said Trustee by reason of its acceptance and/or

administration of this Trust, shall have been fully paid, but it may assign its trusteeship upon ninety (90) days' notice to Trustor and Beneficiary and if a successor trustee (a receipt from the successor being a release to it in the premises) shall not have been appointed within said time (being a bank or trust company authorized to act as such under the laws of the State of California) the Trustee may apply to the court for the appointment of a successor or receiver.

THE CONDITIONS and provisions of this Trust shall inure to and shall bind the parties hereto, their successors, heirs, legatees, devisees, administrators, executors and assigns.

Dated this 3rd day of July, 1924.

BANK OF AMERICA,
By (Signed) Jay E. Randall,
Vice-President.
By (Signed) V. B. Showers,
(Initialed:) VBS. Assistant Secretary.

The undersigned, named in the above Declaration of Trust, as Trustor and Beneficiary, do hereby approve, ratify and confirm the same in all its particulars, and do hereby declare that the same sets forth the full terms and conditions under which the said properties are held in trust, and do hereby respectively agree to be bound by all the terms hereof, and to do and perform all the obligations contained therein to be paid, done or performed by us.

(Signed) D. CORNELIUS SMITH,
Trustor.
(Signed) FRED S. LACK,
Beneficiary.

(Signed) BERTHA A. SMITH
(Signed) L. W. COFFEE, Agent.

(Here follows list of lots and selling prices.)

DEFENDANT'S EXHIBIT G
Transcript Pages 63 to 66
ASSIGNMENT

In consideration of the purchase by the Mortgage Corporation of America of the First Trust Deed in the amount of Twelve Thousand Five Hundred

($12,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific, the Theron Walker Engineering and Construction Company hereby assigns, sets over and transfer to the Mortgage Corporation of America, all of its right, title and interest in and to the proceeds of a certain assignment made in its favor and calling for the payment to it of the sum of Three Hundred ($300.00) Dollars per month, due as a result of a lease made and entered into between the Paramount Motors Corporation of the Pacific and G. E. Porter, and hereby gives the Mortgage Corporation of America the right to collect this Three Hundred ($300.00) Dollars per month and apply same to the credit of the Twelve Thousand Five Hundred ($12,500.00) Dollar First Mortgage, only after the Four Thousand Five Hundred ($4,500.00) Dollar Second Trust Deed has been paid off; it being understood that the Three Hundred ($300.00) Dollars per month due on this lease is first to be collected by and paid out by the Bank of America toward the Four Thousand Five Hundred ($4,500.00) Dollar Second Trust Deed, and thereafter the balance of the payments are to accrue to the credit of the Mortgage Corporation of America.

A copy of the assignment, which original is now in the hands of the Mortgage Corporation of America is given below.

"PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC
629 So. Spring Street
LOS ANGELES

Dec. 4, 1924.

For value received, being the loan of sum $17,000.00 to this Corporation, for building purposes on a parcel of land Paramount Heights, Azusa, California, we hereby assign and transfer the $300 per month lease rental mentioned in Lease and Option to G. E. Porter, lessee, of aforementioned building to be constructed, to Theron Walker Engineering & Construction Company, contractors, for a period until the said loan of $17,000.00 has been paid in full, including accrued interest if any; and said

G. E. Porter is hereby directed to pay said $300 monthly lease rental to said Theron Walker Engineering and Construction Company.

Witness the seal of Paramount Motors Corporation of the Pacific, by its Treasurer, this the 4th day of December, 1924.

PARAMOUNT MOTORS CORPORATION
OF THE PACIEIC
SEAL (Signed) N. E. Bliss,
Treasurer."

This will be authority to the Bank of America, as Trustee, to collect the payments due under this lease, and apply them first to the credit of the holder of the Second Trust Deed of Four Thousand Five Hundred ($4,500.00) Dollars and when that is liquidated, to apply the rest to the credit of the Mortgage Corporation of America, the holder of the Twelve Thousand Five Hundred ($12,500.00) Dollar First Trust Deed, or to their assignee.

IN WITNESS WHEREOF, said THERON WALKER ENGINEERING AND CONSTRUCTION COMPANY, has hereunto affixed its name.

THERON WALKER ENGINEERING
AND CONSTRUCTION COMPANY
By (Signed) Theron Walker.

TRUSTEE'S ENDORSEMENT

The foregoing Trust is hereby accepted and the duplicate of this assignment filed in the Trust Department of the Bank of America this 21st day of October, 1925.

BANK OF AMERICA,
By:
(Initialed:) C.R.C. Assistant Trust Officer.

TRUSTEE'S ENDORSEMENT

The foregoing Trust is hereby accepted and the duplicate of this assignment filed in the Trust Department of the Bank of America this 21st day of October, 1925.

BANK OF AMERICA,
By:.....
(Initialed:)CRC Assistant Trust Officer.

DEFENDANT'S EXHIBIT H
Transcript Pages 68 to 70
ASSIGNMENT

In consideration of the purchase by the Mortgage Corporation of America of the First Trust Deed in the amount of Twelve Thousand Five Hundred ($12,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific, the Theron Walker Engineering & Construction Company hereby assigns, sets over and transfers to the Mortgage Corporation of America, all of its right, title and interest in and to the proceeds of a certain assignment made in its favor and calling for the payment to it of the sum of Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars, due for improvements on account of trust No. 243 with the said Bank of America, with the exception of the sum of Four Thousand Five Hundred ($4,500.00) Dollars, which is first to be deducted from the amount of Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars and made payable in favor of the Second Trust Deed of Four Thousand Five Hundred ($4,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific in favor of H. E. Seaton. A copy of the assignment, which original is now in the hands of the Bank of America, is given below.

Los Angeles, Calif.
Dec. 4, 1924.

"Bank of America,
Los Angeles, California. TRUST #243
Gentlemen:

You are hereby authorized, directed and instructed to pay up to, and no more, $11,965.00 due for improvements, as per attached documents, on Paramount Heights, Azusa, California, Tract No. 8507, to Theron Walker Engineering & Construction Company, as assigns of Paramount Motors Corporation of the Pacific, taking proper receipt therefor, out of any and all improvement funds coming to you and payable therefrom under Bank of America Trust #243, at the rate of FORTY (40%) PER CENT of said funds, or any amount thereunder,

that may come to you and be payable from improvement funds under said Trust #243, beginning on the first day of February, 1925; payment to be made to said Theron Walker Engineering & Construction Company, on the first day of each month, as they may indicate to you, of any improvement funds paid to you and payable to you for the preceding month, until, and not longer, said amount of $11,965.00 shall have been so paid.

(Signed) L. W. Coffee,
Agent Beneficiary under Trust #243.

This will be authority to the Bank of America, as Trustee, to make all payments under the above order to the Mortgage Corporation of America, owner of said Twelve Thousand Five Hundred ($12,500.00) Dollar trust deed until it shall have received from the Bank of America full amount of said assignment, less such amount as has been paid on the second trust deed.

In Witness Whereof, said Theron Walker Engineering and Construction Company, has hereunto affixed its name.

Theron Walker Engineering and
Construction Company
By (Signed) Theron Walker.

DEFENDANT'S EXHIBIT I
Transcript Pages 71 to 73
(In Pen and Ink:) Copy for Bk. of America.

ASSIGNMENT

In consideration of the purchase by Dr. P. B. Roper of the 2nd Trust Deed in the amount of Four Thousand Five Hundred ($4,500.00) Dollars, executed by the Paramount Motors Corporation of the Pacific, the Theron Walker Engineering and Construction Company hereby assigns, sets over and transfers to Dr. P. B. Roper, all of its right, title and interest in and to the proceeds of a certain assignment made in its favor and calling for the payment to it of the sum of Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars due for improvements on account of trust No. 243, with the said Bank of America, it being understood

that collections made by the Bank of America of this Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars shall be credited to the account of Dr. P. B. Roper, the holder of the Four Thousand Five Hundred ($4,500.00) Dollar Trust Deed, until said Trust Deed is liquidated, and thereafter further collections on said Eleven Thousand Nine Hundred and Sixty-five ($11,965.00) Dollars shall be subject to the order of the Theron Walker Engineering and Construction Company, or its assignee.

A copy of the assignment, which original is now in the hands of the Bank of America is given below:

Los Angeles, Calif.
Dec. 4, 1924.

"Bank of America,
Los Angeles, California.

TRUST #243

Gentlemen:

You are hereby authorized, directed and instructed to pay up to, and no more, $11,965.00 due for improvements, as per attached documents, on Paramount Heights, Azusa, California, Tract No. 8507, to Theron Walker Engineering & Construction Company, as assigns of Paramount Motors Corporation of the Pacific, taking proper receipt therefor, out of any and all improvement funds coming to you and payable therefrom under Bank of America Trust #243, at the rate of Forty (40%) Per Cent of said funds, or any amount thereunder, that may come to you and be payable from improvement funds under said Trust #243, beginning on the first day of February, 1925; payment to be made to said Theron Walker Engineering & Construction Company, on the first day of each month, as they may indicate to you, of any improvement funds paid to you and payable to you for the preceding month, until, and not longer, said amount of $11,965.00 shall have been so paid.

(Signed) L. E .Coffee,
Agent Beneficiary under Trust #243."

This will be authority to the Bank of America, as Trustee, to make all payments under the above order

to Dr. P. B. Roper, owner of the Four Thousand Five Hundred ($4,500.00) Dollar Trust Deed until he shall have received the full amount due under such Trust Deed with interest until date of liquidation.

IN WITNESS WHEREOF, said THERON WALKER ENGINEERING AND CONSTRUCTION COMPANY, has hereunto affixed its official name.

THERON WALKER ENGINEERING AND CONSTRUCTION COMPANY
By (Signed) THERON WALKER.

3/17/25

Accepted:
(Signed) P. B. ROPER.

DEFENDANT'S EXHIBIT J
Transcript Page 75 to 90

(Defendant's Exhibit E:)

"L. W. COFFEE
Realtor
Suite 406 Grosse Building
124 W. 6th St., Corner Spring
Telephone Trinity 2791
Azusa Telephone 370-32

Subdivisions
Electric Park
Manchester Court
Kagel Canyon Park
Paramount Heights
Fernwood Park
Cherry Blvd. Center
Capistrano Beach
'The Birth of a City'
Bank of America
Los Angeles, Calif.

Los Angeles, Calif.,
December 3, 1924.

TRUST #243

Gentlemen:

You will herewith please find attached all bills due Wm. Martin to date for grading streets on Tract No. 8507, Paramount Heights, Azusa, California, under your Trust #243.

Said bills amount to a total of $7,554.91, being unpaid on this day. You are, therefore, authorized, directed and instructed to pay up to said amount,

and no more, this amount for said improvements to Wm. Martin, contractor, as per these bills and requisition duly signed by the Engineer of the Tract and the undersigned, agent for the beneficiary, out of 75% of all moneys coming to you and creditable to the Improvement Fund under your Trust #243, between this day and February 1, 1925, and, thereafter, if any amounts on this bill remain unpaid, you are hereby authorized, directed and instructed to pay to said Wm. Martin until said total has been paid in full at the rate of 40% out of any money coming to your hands and payable for that purpose.

Very truly yours,
(Signed) L. W. COFFEE
Agent for the Beneficiary,
Trust #243.

I hereby accept the foregoing order on the Bank of America, Trust #243, for the payment of funds as per amounts herein in this instrument set forth.

(Signed) WM. MARTIN.

(In pen and ink:)
Approved by R. E. Clapp.

(In pen and ink:)
12/17/24 Rec'd copy.
(In pencil:) E. L. R."

"SUBDIVISIONS
Electric Park
Manchester Court
Kagel Canyon Park
Paramount Heights
Fernwood Park
Cherry Blvd. Center
Capistrano Beach
'The Birth of a City'

L. W. COFFEE
Realtor
Suite 406 Grosse Building
124 W. 6th St., Corner Spring
Telephone TRinity 2791
Azusa Telephone 370-22

Los Angeles, Calif.,
Dec. 4, 1924.

BANK OF AMERICA,
Los Angeles, California.

TRUST #243

Gentlemen:

You are hereby authorized, directed and instructed to pay up to, and no more, $11,965.00 due

for improvements, as per attached documents, on Paramount Heights, Azusa, California, Tract No. 8507, to Theron Walker Engineering & Construction Company, as assigns of Paramount Motors Corporation of the Pacific, taking proper receipt therefor, out of any and all improvement funds coming to you and payable therefrom under Bank of America Trust #243, at the rate of Forty (40%) Per Cent of said funds, or any amount thereunder, that may come to you and be payable from improvement funds under said Trust #243, beginning on the first day of February, 1925; payment to be made to said Theron Walker Engineering & Construction Company, on the first day of each month, as they may indicate to you, of any improvement funds paid to you and payable by you for the preceding month, until, and not longer, said amount of $11,965.00 shall have been so paid.

(Signed) L. W. COFFEE,
Agent Beneficiary under Trust #243.

(In left-hand margin appears some shorthand, after which appears, in pencil, "Roper," and in parenthesis, in ink, "P. B. Roper".)

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS,
AZUSA, Los Angeles
County, California.

Eecutive Offices
Fifth Floor California Bank Building
629 South Spring Street
Phone FAber 1386
Los Angeles

November 29, 1924.

For value received, being loan to this corporation of $17,000.00, this day for building of factory at Paramount Heights, Azusa, California, the Paramount Motors Corporation of the Pacific, hereby sells, assigns and transfers to Theron Walker Engineering & Construction Co., the following accounts, being monies advanced by this corporation

for improvements at Paramount Heights, Azusa, California, and payable from improvement funds under Trust #243, Bank of America:

Improvement advances Acct. #1 $10,994.85
Improvement advances Acct. #2 970.15

It being understood that all or any portion of said amount when paid to Theron Walker Engineering & Construction Co. shall become a credit on the principal and interest of said aforementioned loan.

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC
(Signed) S. S. Smith,
Vice-President.
(Signed) N. E. Bliss
Treasurer.

SEAL

(Seal:) CORPORATE SEAL 1923 PARAMOUNT MOTORS CORPORATION OF THE PACIFIC DELAWARE.

Paramount in Name Performance Economy Appearance Value Sale Price."

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS,
AZUSA, Los Angeles
County, California.

Executive Offices
Fifth Floor California Building
629 So. Spring Street
Phone TRinity 1386
LOS ANGELES

December 3, 1924.

This is to certify that the following is a true and correct copy of a resolution duly passed by the board of directors of Paramount Motors Corporation of the Pacific, at a Special meeting of said Board, duly held at 4 P. M., Wednesday, December 3, 1924, at the office of the corporation in the City of Los Angeles, California.

RESOLUTION

"Whereas, this corporation did by resolution of the Board of Directors thereof accept the expenditure of Lack & Hurley, Inc., of $10,994.85 of funds

of this corporation for improvements on Tract #8507, Paramount Heights, Azusa, California, at a meeting of said board on the 7th., day of November, 1924, and that said amount is now due from the improvement fund under Trust #243 of Bank of America;

"And, Whereas, that, this corporation accepted as part of the expenditures of Paramount Motors Syndicate, $970.15 paid out on account of improvements on Tract #8507, Paramount Heights, Azusa, California, at a meeting of the board of directors on November 7, 1924, and that said sum is now due and payable from improvement fund under Trust #243, Bank of America; and

"Whereas, that the total paid out on improvement fund on Tract #8507, under Trust #243, Bank of America, as herein indicated is $11,965.00; now,

"THEREFORE BE IT RESOLVED, that the officers, or any of them, of this corporation are hereby authorized, directed and instructed, to assign the aforementioned improvement fund in the amount of $11,-965 to Theron Walker Engineering & Construction Company, to be credited, when and as paid out of improvement fund under Trust #243, Bank of America, as payment to that amount on loan of $17,000, therefrom.

(Signed) CHAS. H. NORTON,
Secretary.
PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

(Seal:) Corporate Seal, 1923. Paramount Motors Corporation of the Pacific Delaware
(In pencil:) Clapp Baird—adopted.
Paramount in Name—Performance—Economy—Appearance—Value—Sale Price.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS,
AZUSA, Los Angeles
County, California.

Executive Offices
Fifth Floor California Bank Building
629 South Spring Street
Phone FAber 1386
Los Angeles

November 29, 1924.

State of California,
County of Los Angeles—ss.

I, N. E. Bliss, being first duly sworn, deposes and says: That, I am the duly elected and qualified Treasurer of Paramount Motors Corporation of the Pacific; that, on November 7, 1924, among other accounts rendered, the Paramount Motors Syndicate, a trust estate, presented a bill in the amount of $970.15 for funds expended by it on improvements at Paramount Heights, Azusa, California, on behalf of said corporation, under Trust #243, Bank of America; that, said amount was accepted by said corporation directors on said date, as a part of other expenditures by said Syndicate on behalf of said corporation, and authorized paid; that, said amount is therefore payable from improvement funds under said Trust #243.

Witness my hand and seal this the 29th day of November, 1924.

(Signed) N. E. Bliss, Treas.

(Corporate seal of Corporation of the Pacific.)

Subscribed and sworn to before me, a Notary Public, in and for the County of Los Angeles, State of California, this the 4th day of December, 1924.

(Signed) A. G. McElhinney,
Notary Public in and for the
County of Los Angeles,
State of California.

My commission expires Nov. 6, 1927.

(Notarial seal of A. G. McElhinney, Notary Public.)

Paramount in Name—Performance—Economy—Appearance—Value—Sale Price.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS,
AZUSA, Los Angeles
County, California.

Executive Offices

Fifth Floor California Bank Building
629 South Spring Street
Phone FAber 1386
LOS ANGELES

November 29, 1924.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

I, N. E. Bliss, first being duly sworn deposes and says: That, I am the duly elected and qualified treasurer of Paramount Motors Corporation of the Pacific; that, on the 7th, day of November, 1924, a bill was rendered by Lack & Hurley, Inc., covering expenditures of corporation funds thereby for improvement purposes at Paramount Heights, Azusa, California, under Bank of America Trust #243, and that the directors of said Paramount Motors Corporation of the Pacific did on said date duly accept said expenditure in the amount of $10,994.85, with the understanding that the same should be repaid from improvement funds in the sale of lots under said Trust.

WITNESS my hand and seal this the 29th day of November, 1924.

(Signed) N. E. BLISS, Treas.

Subscribed and sworn to before me this the 4th day of December, 1924.

(Signed) A. G. MCELHINNEY,
Notary Public in and for the
County of Los Angeles,
State of California.

My commission expires Nov. 6, 1927.

(Notarial Seal of A. G. McElhinney, Notary Public.)

(Corporate seal of Paramount Motors Corporation of the Pacific.)

Paramount in Name—Performance—Economy—Appearance—Value—Sale Price.

Los Angeles, California.
December 2, 1924.

BANK OF AMERICA,
Los Angeles, California.
Gentlemen:

The undersigned, R. E. Clapp does hereby certify that the undersigned is the engineer in charge of the supervision of the work in respect to Subdivision improvement of Tract 8507 known as Paramount Heights Tract, Azusa, California;

THAT the undersigned is familiar with the present condition of said Tract and has examined the attached bills in the sum of $11,965, and

THAT the said bills represent work actually done and sums actually expended on said Tract for materials and labor actually furnished and accounts actually due on behalf of said tract in respect thereto and thereon and are complete as to the particular items therein referred to, and

THAT all of said items are essential to the necessary subdivision improvement of said property as required under the provisions of Declaration of Trust No. 243 of Bank of America and are the reasonable value of the work, labor and materials furnished.

Dated this 2nd day of December, 1924.

(Signed) R. E. CLAPP,
Consulting Engineer.

STATE OF CALIFORNIA,
County of Los Angeles—ss.

L. W. Coffee being first duly sworn, deposes and says: That, he is a Citizen of the United States and of the State of California and is the designated agent of the beneficiary under Bank of America Declaration of Trust No. 243; That he has examined the bills attached hereto in the total sum of $11,-965.00, and hereby represents that said statements as contained therein are full, true and correct statements of the matters covered therein; that the items of labor and materials as represented thereby have actually been furnished to and used upon the Tract

No. 8507 in the Subdivision Improvement thereof, and are of the reasonable value therein set out, and that no item therein contained has been paid; That the Bank of America as Trustee under said Declaration of Trust No. 243 is hereby authorized and directed to make payment of said bills to the said parties or their orders and the payment thereof and each and every of the items contained therein are hereby approved by me as authorized agent of the beneficiary under said Declaration of Trust.

Dated 4 day of Dec., 1924.

(Signed) L. W. COFFEE.

Subscribed and sworn to before me this 4 day of Dec. 1924.

(Notary Seal of A. G. McElhinney, Notary Public)

(Signed) A. G. MCELHINNEY,
Notary Public in and for the County of Los Angeles, State of California. My commission expires Nov. 6, 1927.

SCHEDULE OF IMPROVEMENT EXPENDITURES ON PARAMOUNT HEIGHTS BY PARAMOUNT MOTORS CORPORATION OF THE PACIFIC

DATE	TO	PURPOSE	
1923			
12/6	L. W. Coffiee	Clearing Land	$1,090.00
12/19	C. H. Hills	Surveying	201.40
12/25	L. W. Coffiee	Land Grading	250.00
12/28	Paul Clarke	Land Grading	250.00
1924			
1/2	Paul Clarke	Land Grading	250.00
1/8	Paul Clarke	Land Clearing—Grad.	500.00
1/8	C. H. Hills	Surveying	325.00
1/10	Paul Clarke	Land Clear.—Grading	250.00
1/21	L. W. Coffiee	Land Grading	250.00
2/7	Paul Clarke	Land Grading	250.00
2/7	C. H. Hills	Surveying—Clearing	184.50
2/9	Paul Clarke	Land Grading	250.00
2/16	Paul Clarke	Land Grading	250.00

2/21	Paul Clarke	Land Grading	250.00
3/1	Paul Clarke	Land Grading	250.00
3/1	City of Azusa	Land (Union Rock)	3,500.00
3/15	Paul Clarke	Land Grading	250.00
3/19	Paul Clarke	Land Grading	500.00
4/5	Paul Clarke	Land Grading	250.00
4/12	Paul Clarke	Land Grading	250.00
4/19	Paul Clarke	Land Grading	250.00
4/25	Paul Clarke	Land Grading	250.00
5/2	Paul Clarke	Land Grading	250.00
5/24	Paul Clarke	Land Grading	693.35
		Total Amount	$10,994.85
6/1 to 10/1-24	Paramount Mtrs.	Land Work	970.15
			11,965.00

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC
Factory Location
PARAMOUNT HEIGHTS,
AZUSA, Los Angeles
County, California.

Executive Offices
Fifth Floor California Bank Building
629 So. Spring Street
Phone TRinity 1386
LOS ANGELES

December 3, 1924.

This is to certify that the following is a true and correct copy of a resolution duly passed and ratified by the Board of Directors of Paramount Motors Corporation of the Pacific, at a special meeting of the Board of Directors of said Corporation, held on the third day of December, 1924, in the office of the Corporation in the City of Los Angeles, California.

RESOLUTION

"WHEREAS, this Corporation desires to secure a loan for a factory building, to be situated on twenty acres of land subject to deed to this Corporation, with a consideration in Trust #243, Bank of America, mentioned, in Tract 8507, Paramount Heights,

Azusa, California, described as to metes and bounds in order for said deed, of not to exceed $17,000.00, together with interest thereon at rate of eight per cent per annum, said loan to be made by Theron Walker Engineering & Construction Company, or order; and,

"WHEREAS, that to secure this loan together with other considerations, i. e., assignment of repayment rights of $11,965.00, heretofore advanced by this Corporation for improvements on Tract 8507, it is the desire of this Corporation to execute a mortgage and trust deed of said twenty acres of land to H. E. Seaton, on order of aforesaid Engineering Company; now,

THEREFORE BE IT RESOLVED, that the officers, or any of them, of this Corporation are hereby authorized, directed and instructed to accept from Bank of America, under Trust #243, deed to twenty acres of land, in said deed described as a 20.00 Acre Parcel—East and West Center Line of which is the Center Line of Paramount Street; a portion of Lots 11 and 12, Subdivision No. 2, Azusa Land and Water Company, as recorded in Book 43, Page 94, Miscellaneous Records of Los Angeles County, California; and,

"To secure loan from, or through, Theron Walker Engineering & Construction Company, in the amount of $17,000.00 for one year, paying interest thereon at the rate of eight per cent per annum, and as security for said loan to execute mortgage and trust deeds to said Engineering Company, or on their order to H. E. Seaton, covering said twenty acres of land in Tract 8507, Paramount Heights, Azusa, California, described in said mortgage; and to do such other things in connection therewith as may be necessary and expedient to further the interests of this corporation."

(CORPORATE SEAL OF
PARAMOUNT MOTORS CORPORATION OF THE PACIFIC)

(Signed) CHAS. H. NORTON, *Secretary*
PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

DEFENDANT'S EXHIBIT
No. K
No. J 85 H

Specializing in designing, financing and construction of apartments, hotels, commercial and industrial building.

Phone	Architecture
FAber 0775	Engineering
Suite 614	Designing
Spreckles Bldg.	Financing
714 So. Hill St.	Construction

THERON WALKER
ENGINEERING & CONSTRUCTION CO.
MANAGERS OF CONSTRUCTION
LOS ANGELES

PARAMOUNT MOTORS PROJECT

Name of Owner: Paramount Motors Corporation of the Pacific (Factory Building)

Address of Owner: Executive Offices — California Bank Building, 5th Floor, Los Angeles, Calif.

Location of Factory: City limits of Azusa.

The Paramount Motors Corporation was organized under the laws of the State of Delaware and has a permit for operation in the State of California. It was organized for the purpose of manufacturing a small automobile, of about the Ford type. They have taken over, within the City limits of Azusa, 160 acres of land, of which 60 acres has been set aside for factory purposes and the other 100 acres is being sub-divided into lots. These lots, when sold, should bring in a gross amount of about $400,000. Of this amount approximately $100,000. worth has been sold to date. The money from the sale of these lots is going into a trust fund into the Bank of America, part of which will be used for the construction of their various factory buildings.

Of the 60 acres of land set aside for the purpose of building factories upon, 20 acres has been placed under a mortgage of $17,-

000. to build a one and a half story plant, which will be their first unit.

Lease: This first unit has been leased out to the Porter Automobile Body Manufacturing Company for several years, at a rental of $300.00 per month. Said body manufacturing company to give a mortgage on approximately $3,000 worth of machinery and equipment as security on the lease. Responsible guarantors are on the lease until such time as the building is completed and the machinery and equipment in place, at which time they will be released and a chattel put on said machinery and equipment.

Land: The land is variously appraised at from $900 to $1000 an acre and we are informed that it has been assessed by the County Assessor at $600 per acre.

Value: Contract price of the building is $17,000.

Owner's Value of Land: $800 per acre—total $16,-000, making a total valuation as security of $33,000.

Re-Payment: In addition to the land and building as security, arrangements have been made for 40% of all money received from subdivision over selling cost of 15% to apply on this loan through the Bank of America. On existing contracts at present in the bank, it is estimated that this should run over $500 a month. In addition to that, an assignment of the lease has been made and this $300 per month will also accrue to the re-payment of the loan. Of the contract price, a first trust deed in the amount of $12,500, dated December 1, 1924 has been placed on, with re-payment of $800 per month, to commence on same under date of August 1, 1925 and continue monthly thereafter until December 1, 1925, on which date the remaining balance is made due and payable. This trust deed carries 8% interest.

A second trust deed in the amount of $4,500 has been placed on the same, bearing

8% interest and due and payable at the rate of $800 per month, including interest, the first payment becoming due February 1, 1925.

The legal description of the property is appended hereto on another sheet.

It is anticipated by the Paramount Motors Corporation that this entire loan of $17,000 will be liquidated in the very near future by the sale of lots and that arrangements can satisfactorily be made to start the construction of the remaining units of their plant by March 1, 1925.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC

Factory Location
PARAMOUNT HEIGHTS, AZUSA
Los Angeles County
California

EXECUTIVE OFFICES
Fifth Floor California Bank Building
629 So. Spring Street
Phone TRinity 1386
LOS ANGELES

Nov. 1st, 1924

Loan Desired ~~$15000~~ $17,000:

Purpose: All to be used for building on 20 acres of clear land.

Land: 20 acres, center of west 60 acres of 160 acres described in attached Trust #243, Building to be on north 10 acres of the 20 acres.

Location: City of Azusa-Los Angeles, County. See attached plat and Trust for description.

Value: Land appraised at approximately $800 to $1000 an acre. See Bank of America for selling price of adjoining lots. Land assessed by County Assessor at $600 per acre.

Purpose of Building: To be used jointly by Porter Body Works and Paramount (for building demonstration cars pending completion of Paramount interest in Trust #243).

Lease: Body works will lease for three years at ~~$250~~ to $300 per month. All above interest to apply on purchase of 10 acres and building, at cost. Machinery clear will equal over $2,500. Will agree to place machinery in building immediately on completion of building.

Repayment: In addition to land and building as security will arrange for 40% of all money received from subdivision over selling cost of 15% to apply on loan through Bank of America. This now on contracts in bank will run over $500 a month. This up to $12,000 to $13,000. Being an amount the corporation has put up in cash for improvements on subdivision.

Further: When $240,000 in cash and land contracts and $80,000 in contracts in sale of lots are in Bank of America the $240,000 in cash payments or contracts or both go to Paramount for factory building purposes along with 40 acres of land clear in addition to 20 acres.

Of the above over $100,000 in lot sales have been made.

Remarks: The 20 acres may be Deeded to an individual or Trustee or Corporation as desired, and contract for remaining security made with *concorporation* and lease rights may be put up also or payments made thereunder.

Defts Ex D for ident.

(Endorsed): Filed Apr 8 1927, R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause]

No. J 85 H

STIPULATION

IT IS STIPULATED that in the preparation and printing of the transcript for Appeal herein, the title of the court and of the cause in the captions of Pleadings,

Affidavits, Motions, Orders, etc., may be indicated thus: "Title of Court"; "Title of Cause," and need not be printed in full; and that the endorsements on such documents, except the filing endorsement, may also be omitted.

MAYNARD F. STILES,
For Complainant.
SAMUEL C. COHN & CLORE WARNE,
For Defendants.

(Endorsed)

Approved Oct. 17, 1927.

EDWARD J. HENNING,
Judge.

Filed Oct 17 1927. R. S. Zimmerman, Clerk, by Edmund L. Smith.

[TITLE OF COURT AND CAUSE]

No. J 85 H

PRÆCIPE

To the Clerk of said Court:

Sir:

Please prepare transcript on appeal consisting of:

1. Order of Feb. 28th, 1927, restoring cause to Docket and filing Answer.
2. Answer.
3. Order denying Leave to file Amended and Supplemental Bill.
4. Proposed Amended and Supplemental Bill.
5. Affidavit of S. S. Smith, sworn to April 25th, 1927.
6. Affidavit of Theron Walker, sworn to April 27, 1927.
7. Affidavit of H. E. Seaton, sworn to May 3, 1927.
8. Affidavit of S. S. Smith, of May 6th, 1927.
9. Affidavit of L. W. Coffee, of May 6th, 1927.
10. Final Decree.

11. Petition for Appeal and Assignment of Errors.
12. Order awarding Appeal.
13. Appeal Bond.
14. Citation.
15. Statement of the Evidence, omitting Plaintiff's Exhibits 1, 2, 3, 5, 6, 7, and 8, and omitting Defendants' Exhibits A, B, D, E, F, G, H, I, J and L, the original of which exhibits complainant's will ask the Court to send up.

Received copy of above præcipe for transcript on appeal this 29 day of September 1927. Samuel C. Cohn and Clore Warne Attorneys for Defendants.

(Endorsed): Filed Sep. 30, 1927, R. S. Zimmerman, Clerk; By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

No. J 85 H

PRÆCIPE

To the Clerk of Said Court:

Sir:

Please be advised that the appellees desire additional portions of the record incorporated into the transcript on appeal consisting of the following:

1. That there be included in the statement of evidence the following designated Exhibits:

(a) Plaintiff's Exhibit 1.
(b) Plaintiff's Exhibit 2.
(c) Plaintiff's Exhibit 7.
(d) Plaintiff's Exhibit 9.
(e) Defendants' Exhibit A.
(f) Defendants' Exhibit D. (Ident.)
(g) Defendants' Exhibit E.
(h) Defendants' Exhibit F.

(i) Defendants' Exhibit G.
(j) Defendants' Exhibit H.
(k) Defendants' Exhibit I.
(l) Defendants' Exhibit J.
(m) Defendants' Exhibit K.

SAMUEL C. COHN AND CLORE WARNE,
By CLORE WARNE,
Solicitors for Appellees.

Received copy of the foregoing præcipe this 7th day of October, 1927.

MAYNARD F. STILES,
CAESAR A. ROBERTS,
Solicitors for Complainant and Appellant.

(Endorsed): Filed Oct. 8, 1927, R. S. Zimmerman, Clerk; By L. J. Cordes, Deputy Clerk.

[TITLE OF COURT AND CAUSE]

CLERK'S CERTIFICATE

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing volume containing 151 pages, numbered from 1 to 151, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of ~~Citation;~~ the Original Citation, Order of Feb. 28th, 1927, restoring cause to Docket and Filing Answer; Answer; Ordering denying leave to file Amended and Supplemental Bill; Proposed Amendment and Supplemental Bill; Affidavit of S. S. Smith, sworn to April 25th, 1927; Affidavit of Theron Walker, sworn to April 27th,

1927; Affidavit of H. E. Seaton, sworn to May 3rd, 1927; Affidavit of S. S. Smith, sworn to May 6th, 1927; Affidavit of L. W. Coffee, sworn to May 6th, 1927; Affidavit of R. E. Clapp, sworn to May 6th, 1927; Final Decree; Petition for Appeal and Assignment of Errors; Order Awarding Appeal; Appeal Bond; Statement of the Evidence; Plaintiff's Exhibits 1, 2, 4, 7 and 9; Defendant's Exhibits A, C, E, F, G, H, I, J, and K; Stipulation for Diminution of Record and the Praecipe.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $ 31.70 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 9th day of Nov., in the year of Our Lord One Thousand Nine Hundred Twenty-seven, and of our Independence the One Hundred Fifty-~~first~~ second.

R. S. Zimmerman,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By Edmund L. Smith *Deputy Clerk.*

(Seal)

[illegible]

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,

Complainant below,
Appellant,

vs.

TITLE GUARANTEE & TRUST COMPANY, a corporation; THE MORTGAGE CORPORATION OF AMERICA, a corporation, and [illegible] WALKER, [illegible] and doing business as [illegible] WALKER ENGINEERING & CONSTRUCTION COMPANY,

Defendants below,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Brief For Appellant

[illegible] F. [illegible], Esq.,
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Los Angeles, California.
Attorneys for Appellant.

[illegible]

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NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,
Complainant below,
Appellant,

vs.

TITLE GUARANTEE & TRUST COMPANY, a corporation, et al.,
Defendants below,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Brief For Appellant

STATEMENT OF THE CASE

This is an appeal from a decree entered July 7th, 1927, in effect dismissing complainant's amended bill upon the hearing, and is the second appeal by complainant. The former appeal was from a decree dismissing the same amended bill for alleged want of equity on motion to dismiss, and that action was reversed by this Court and the cause was remanded. The cause

was No. 4858 of this Court and is reported in 15 (2nd) Fed. 298, and we reproduce therefrom and adopt, as part of this statement, the summary of the amended bill made by the Court in its opinion, as follows:

"The allegations of the amended complaint are substantially these:

"That prior to November, 1924, the appellant was the owner of a 20-acre tract in Los Angeles County, Cal.; that on November 28, 1924, it entered into a contract with one Theron Walker, under the designation Theron Walker Engineering & Construction Company, to furnish the labor and material for the construction of a building on the tract for the sum of $17,000; that, before entering into the construction contract, Walker represented to the appellant that one Seaton would advance the money to cover the cost of constructing the building, taking notes of the appellant therefor amounting to $17,000; that the appellant accordingly, and at the instance and request of Walker, executed to Seaton two promissory notes, for $12,500 and $4,500 respectively, and secured the same by a deed of trust on the 20-acre tract, executed by the appellant in favor of the Title Guarantee & Trust Company, as trustee, for the benefit of Seaton; that, notwithstanding the execution of the notes and deed of trust, Seaton paid no money or other thing of value therefor, and failed to finance the building project; that on December 4, 1924, Seaton assigned the notes and deed of trust to Theron Walker Engineering & Construction Company, without recourse; that Seaton was the nominee and agent of Walker in the transaction; that after the assignment of the notes and deed of trust to Walker he appellant assigned to

him, under the designation of Theron Walker Engineering & Construction Company, claim and demand in the sum of $11,965 against the Paramount Heights Subdivision as payment *pro tanto* upon the two notes, and the assignment was so accepted by Walker; that no application of the payment thus made was directed by the appellant, but the appellant is informed and assumes that the payment was applied upon and extinguished the $4,500 note, leaving the balance to be applied on the $12,500 note, and that not more than $5,000 is now due upon the latter, together with a small amount of interest; that on December 18, 1924, Walker, under the name of Thereon Walker Engineering & Construction Company, assigned and transferred the $12,500 note and his rights under the deed of trust securing the same to the Mortgage Corporation of America, and assigned to the same corporation the claim of $11,965 against the Paramount Heights Subdivision; that Seaton paid no money or other consideration on account of the execution of the promissory notes, and the appellant received no consideration on account thereof, except the building contract and the work done thereunder; that Walker paid no consideration to Seaton for the assignment of the notes, and the Mortgage Corporation of America paid no consideration to Walker, but took the assignment under an agreement to pay certain claims and demands. It is then averred that, notwithstanding the premises the Mortgage Corporation of America has made demand upon the trustee to foreclose the deed of trust for default in the payment of the $12,500 note and interest; that the trustee has filed in the office of the couny recorder of Los Angeles County a notice of such

default; and that the appellees are threatening to and will sell the property covered by the trust deed to satisfy the full amount of the note, unless restrained from so doing by order of court."

Upon receipt of the mandate showing that the decree of the District Court had been reversed, that Court entered its order overruling the motion to dismiss, and filing the answer of Title Guarantee & Trust Company and Mortgage Corporation of America, (R. 3).

THE ANSWER (R. 4) contains three separate purported defenses to the amended bill. The first of these is an attempted traverse of the allegations of the bill, except the jurisdictional ones and except that it admits that Walker assigned the $12,500 note and mortgage to the Mortgage Corporation, that $750 in interest was paid upon it, and that the defendants claim the full $12,500 and are proceeding to foreclose the deed of trust, and denies that the $11,965 claim was assigned to Walker as payment on the notes held by him or was accepted as such payment. The second defense is a demurrer.

In the Third Defense (R. 10), defendants aver that on November 24, 1924, complainant and Walker entered into a contract for the construction of a factory building on the land referred to for the sum of $17,000 to be paid to Walker in notes for $12,500 and $4,500 secured by a first and a second deed of trust respectively upon the premises, these notes to be received by Walker "in full payment for all work, labor, and material to be furnished in the erection of said building," and afterwards, on December 1st, 1924, in pursuance of said contract and as part payment of the considera-

tion to be paid Walker, complainant issued its note for $12,500 "payable to a nominee of said Walker, one H. E. Seaton," which note was secured by deed of trust conveying said land to Title Guarantee & Trust Company, a copy of which note, with the assignments thereon, is set out in said answer; that on December 18th, 1924, Walker, "in the ordinary course of business," offered said note for sale to Mortgage Corporation of America and sold same to said corporation, representing that this note was part of the consideration to be paid under the building contract, for the sum of $10,000 to be paid to said Walker by said Mortgage Corporation upon his order and demand as said building "was progressively completed," final payment to be made when notice of completion should be filed and a guarantee furnished that the building was free from building liens, which sum of $10,000 was afterwards paid; that at the time of the sale of said note by Walker to the Mortgage Corporation, complainant by its proper officers executed to said corporation an "offset statement and representation of indebtedness," a copy of which statement is set out in the answer; that said note was payable at the rate of $800.00 or more on the first day of each month from August to December, 1925, at which time the balance of $9,300.00 should be paid, and complainant paid the quarterly installments of interest due until September 1st, 1925, but no payments upon the principal were made, but complainant continued in default until October 21st, 1925, when the Mortgage Corporation made demand upon the trustee, declaring all the indebtedness due and payable at once, and filed in the County Recorder's office notice of its election to have

the property sold, and the trustee was required under the law to proceed within three months to sell the said property, and did accordingly publish notice of proposed sale. And the defendants aver that nothing has been paid on said note except said interest installments and that the whole principal and the interest at eight per cent since September 1st, 1925, is now due.

In April, 1927, this cause came on for hearing and much evidence was introduced, and among other things the relation of H. E. Seaton to the transactions in question and his apparent want of participation therein were disclosed, and after the close of the evidence the complainant on May 2nd, 1927, tendered to the Court and asked leave to file an

Amended and Supplemental Bill (R. 19) in which, after summarizing all the allegations of the previous amended bill and reaffirming them, except so far as they may be varied or modified by the amended and supplemental bill, it is averred, by way of amendment and supplement to said amended bill, that in all the dealing in reference to said notes the officers and agents of complaintant never came into personal contact or direct communication with Seaton and had no knowledge or information concerning him except such as was derived from Walker, who represented that Seaton was a moneylender who would provide the money for financing the building under contemplation, and with that understanding complainant executed the said notes to him, but afterwards and during the pendency of this suit the defendants filed therein an affidavit of Walker stating, among other things, that Seaton was "the nominee and agent" of Walker, and complainant, assuming that to be

true, averred in its amended bill, subsequently filed, that Seaton was such nominee and agent, and assuming from the face of the papers and the claims of the defendants that Seaton had actually assigned said notes and deeds of trust to the Mortgage Corporation of America, averred that Seaton had so assigned them, but, that later and since the taking of the evidence herein, on April 8th, 1927, complainant had been informed and now avers that Seaton was not the agent of Walker, that he never assigned or otherwise transferred said notes to Walker or The Theron Walker Engineering Company or to anyone else and never authorized Walker or anyone else to assign said notes or take any action whatever in his, Seaton's, name in the premises; wherefore, no title to said $12,500 note passed to Walker or to Mortgage Corporation of America, by the pretended or attempted assignment thereof.

Said Amended and Supplemental Bill further averred that prior to the commencement of the suit the trustee in said deed of trust had published notice of intended sale of said twenty acres of land, at the instance of Mortgage Corporation of America, claiming that there was due the full sum of $12,500.00 and certain interest and alleged disbursements and expenditures aggregating $500.00 or $600.00 additional, and upon the filing of the bill herein the sale was suspended, but upon dismissal of the amended bill on motion to dismiss, notice of proposed sale was again published, in which the amount claimed to be due was stated to be the sum of $15,729.37, and it was recited that the Mortgage Company "has been obliged to and has paid out and advanced the sum of $2,579.43 for the purpose of protecting the

interests of the trust, said payment and advancement having been made in accordance with the provisions of said trust deed," which threatened sale was enjoined by the Circuit Court of Appeals, pending the hearing of the appeal from the decree dismissing said amended bill, but the defendants still make claim to said sum of $15,729.37. The complainant further avers, upon information derived from defendants' counsel, that $2,000.00 of the $2,579.43 alleged to have been paid out by said Mortgage Company "for the purpose of protecting the interests of said trust," consisted of fees allowed to counsel for defending this suit and not for any purpose of defending the interests of the trust; that said sum was fixed, allowed, and paid (if paid) without the authority, consent or knowledge of complainant, and the only suit which the trustee or the beneficiary under said trust deed was authorized to defend at the expense of the trustor was "to protect the title" to the property conveyed by the trust deed, and no such suit ever had been brought; and that the defendants have no rights under said trust deed, but if they have, and whatever else it may be, said $2,000.00 charge is illegal and without color of authority, notwithstanding which want of any right in the premises the Mortgage Company is claiming the said sum of $15,729.37 or more, on account of said $12,500.00 note, and said defendant and the Trust Company are threatening to enforce said unlawful claim by a sale of complainant's land and buildings.

Complainant, protesting that the defendants have no rights or valid claims against complainant under said note and deed of trust, nevertheless offers to do and

abide by whatever justice and equity may require of complainant in the premises, and prays that it be adjudged that complainant is not indebted to Mortgage Corporation of America in the sum of $12,500 or the sum of $15,729.37, or any other sum, that the defendants have no rights against complainant under said trust deed and that they be enjoined from prosecuting any proceedings thereunder, and for general relief.

In support of the motion for leave to file said amended and supplemental bill, complainant filed the affidavit of S. S. Smith, vice-president of complainant, (R. 29), tending to sustain the allegations of the bill with reference to the relation of Seaton to the note transaction, and the defendants filed the affidavits of Walker, (R. 31) and Seaton (R. 33) in contradiction thereof, and complainant filed the reply affidavit of Smith, detailing an interview with Seaton upon which the bill was largely based (R. 35), the affidavits of L. W. Coffee, (R. 38) and R. E. Clapp (R. 39), supporting the bill.

On June 24, 1927, the Court denied the motion for leave to file (R. 19) and on July 7th, 1927, entered its decree whereby it finds that the complainant "has not maintained the material allegation of its amended billl by a preponderance of evidence" and "specifically finds that any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment," and decrees that complainant take nothing (R. 41).

From this decree complainant appealed to this Court, assigning numerous errors, (R. 42, 47) September 13, 1927, but in the meantime the defendants renewed their notice of foreclosure sale, enlarging the amount which they proposed to enforce against complainant's land from

the not too modestly extortionate sum of $15,729.37 to the preposterous demand of $19,547.39, based on the note for $12,500.00. The sale was stopped by this Court at the September term at Seattle.

Upon the hearing, complainant proved all the allegations of the amended bill not admitted by the pleadings, or otherwise, by the testimony of R. E. Clapp, managing director of complainant, and by certain documentary evidence and rested. Much evidence, oral and documentary, was introduced by the defendants, very little of which had any appreciable relation to the issues and most of it none whatever. The statement of the evidence proposed by appellant erred on the side of liberality and the praecipe for the record (R. 148) called for the printing of all the exhibits which it was believed the Court would need to refer to, but at the instance of appellees (R. 149) others, covering 55 pages, were printed.

The defendants offered in evidence the so-called "offset statement" set out in the answer, Exhibit C (R. 107) and complainant objected, but the Court admitted it, and later overruled complainant's motion to strike it out.

The defendants also introduced in evidence, over complainant's objection to its materiality, the notice of the time when the building constructed by Walker was completed, Exhibit E (R. 108). Complainant objected to the admission in evidence of a certain so-called "Stop Order" (R. 70), by which one Lack forbade the Bank of America to pay out any improvement funds of Trust 243 without Lack's prior approval, but the paper was admitted in evidence. There were also admitted in evidence over complainant's objection to their competence

or materiality, sundry other papers which were made the ground of exception.

SPECIFICATION OF ERRORS RELIED UPON

First: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the paper called "Owner's Offset Statement" (defendants' Exhibit "C") signed by Paramount Motors Corporation of the Pacific, by Chas. H. Norton, Sec'y., addressed to Union Bank & Trust Company of Los Angeles, at the latter's request, stating that said Paramount Motors Corporation of the Pacific is the maker of the promissory note dated December 1st, 1924, in favor of H. E. Seaton and secured by a deed of trust upon a twenty-acre tract of land, describing it; that said maker is the owner of said premises; that the unpaid balance of said note is $12,500; that the interest on said note is unpaid; that said maker has no offsets, claims nor defense to said note, and that said note and trust deed have been assigned and the new owner's name and address is Mortgage Corporation of America, 310 Union Bank Building, Los Angeles, California; which paper was offered for the purpose of showing that the complainant was estopped to claim any credit upon or offset to or defense against said note.

The Court erred in admitting said paper in evidence, it appearing upon its face to be addressed to a stranger to the transaction, the Union Bank & Trust Company, and not to defendant, Mortgage Corporation of America, or to anyone under whom it claims, it further appearing from the face of said paper that the Mortgage Corporation had already acquired said note, and there being no

claim of estoppel set up in the answer nor anything alleged therein as a foundation for such claim.

Second: The Court erred in over-ruling complainant's motion to strike out the above mentioned "Owner's Offset Statement," defendants' witness having testified that the Mortgage Corporation had purchased the $12,500 note before it received said statement.

Third: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the Notice of Completion, "Defendants' Exhibit E," being an affidavit of the managing director of complainant that the building on said twenty-acre tract of land, contracted to be built by Theron Walker Engineering & Construction Company, was completed January 31st, 1925; the said paper and fact or date of completion being immaterial to any issue in the case.

Fourth: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of complainant, the so-called "Stop Order," a paper purporting to be signed by one F. S. Lack, dated January 18th, 1926, addressed to Bank of America, ordering said Bank not to pay out any funds for improvements in respect to Trust 243 (being the trust a claim against the "improvement fund" of which had been assigned) unless such payment shall have been approved by said Lack, and attempting to authorize the payment of certain small items to sundry persons; the said paper being incompetent and immaterial and irrelevant to any issue in the case. It was not shown that Lack had any authority in the premises or that any action was taken on the order.

* * * * * * * * *

Seventh: The Court erred in refusing leave to com-

plainant to file the amended and supplemental bill tendered to the Court and in refusing to entertain said bill.

Eighth: The Court erred in finding and decreeing that the complainant had "not maintained the material allegations of its amended bill by a preponderance of the evidence."

Ninth: The Court erred in finding "that any assignment made by the plaintiff to Theron Walker was assignment as collateral only, and not as payment."

Tenth: If the assignment of the $11,965.00 demand was "as collateral," the Court erred in leaving the defendants free to sell complainant's land for the full amount of the $12,500.00 note without first resorting to a sale of the collateral.

Eleventh: The Court erred in permitting the defendants to go on with sale of complainant's land for the full amount of said $12,500.00 note without surrendering or in any manner accounting for the $11,965.00 demand still held by them, whether as collateral or otherwise.

Twelfth: The Court erred in permitting the defendants to proceed with the sale of complainant's land to enforce payment, not only of the full amount of said $12,500.00 note, without deduction of or accounting for the said $11,965.00, but for the further sum of $2,579.43, of which the sum of $2,000.00 is for counsel fees in this suit, added by the trustee without complainant's consent and without authority of law therefor.

Thirteenth: The Court erred in decreeing in favor of the defendants and in denying to complainant the relief prayed for or any relief.

Fourteenth: The Court committed other errors to com-

plainant's prejudice apparent upon the face of the record.

ARGUMENT

We will discuss the errors complained of in their logical, rather than in their chronological order, and the first to claim consideration would seem to be the

REFUSAL TO ENTERTAIN THE AMENDED AND SUPPLEMENTAL BILL

There were two separate matters presented by the amended and supplemental bill that seem to us of such importance as to demand the attention of the Court, neither of which could be presented by the former pleadings, because one of them was of subsequent discovery and the other of subsequent occurrence.

AS TO FICTITIOUS PAYEE

When the original bill herein was filed, complainant, supposing that Seaton in the beginning had been a vital factor in the transaction but had failed to carry out the part he had assumed to play and had assigned the notes made to him by complainant, thought it proper to make him a defendant in the bill, although he apparently had no longer an interest in the matter in controversy, and this was done in order that he might appear, if so disposed, but process was not served upon him as neither his personality nor his whereabouts was known to complainant.

When later in the case it was stated in an affidavit of Walker that Seaton was merely Walker's agent and nominee, it being deemed proper to file an amended bill, Seaton was so designated therein, but was omitted as a party.

When upon the hearing Walker testified that Seaton was "merely a name—a dummy, you might say, that I used to negotiate certain papers for me," but was an actual person and employed at Bullock's, in Los Angeles, (R. 80), he gave complainant for the first time information as to his status and whereabouts. Thereupon Mr. Smith, the vice-president of the complainant, interviewed Seaton and was informed by him that he never had been the agent of Walker, that he never had signed or otherwise transferred the note in question to Walker or to any other person, and had never authorized the same to be done by Walker or any other person, (R. 29). It then seemed desirable to present to the Court by a further amended and supplemental bill the altered situation of the case, which was done, together with the affidavit of Mr. Smith.

Upon the filing of the affidavit of Mr. Smith, the defendants submitted the affidavit of Walker, in which he claimed that Seaton was a friend "of long standing, over seven years," who had consented to "the use of his name as a dummy or nominee or agent;" that he had informed Mr. Clapp that Seaton was to act as such dummy, and that after the delivery of the notes to Walker, Seaton had called at his office and executed the assignment of them, (R. 31); and the affidavit of Seaton (R. 33) to the effect that he had executed the assignment of said notes in Walker's office. He says that about April 10, 1927, some person whose name he does not recall inquired of him at his place of employment about his signature or endorsement upon a certain $12,500 note and that he told him "he did not recall having had any part in any such transaction," but since then his recol-

lection had been refreshed by a proposed affidavit mailed to him by "said person," and "he now recalls the transaction with reference to placing his signature below the endorsement on the reverse side of said notes."

Thereupon complainant submitted the further affidavit of Mr. Smith (R. 35) in which he details the exact conversation had with Seaton, after introducing himself to Seaton and stating his position with Paramount Motors Corporation of the Pacific:

> Q. Do you know anything about the Paramount Motors Corporation of the Pacific?
>
> A. Is it a local concern?
>
> Reply: Yes.
>
> A. I do not.
>
> Q. Do you know Theron Walker or the Theron Walker Engineering and Construction Company?
>
> A. No.
>
> Q. Did you during the month of November, 1924, authorize said Theron Walker to have notes made to you by the Paramount Motors Corporation of the Pacific in the sum of $12,500 and $4,500, and later assign those notes to the said Theron Walker Engineering and Construction Company?
>
> A. Had that been done and the notes were good, I would not be here.
>
> Q. Then I take it you did not?
>
> A. No.
>
> Q. Are you, Mr. Seaton, or were you during the month of November, 1924, a money lender?
>
> A. No.

Complainant also submitted the affidavit of R. E. Clapp, (R. 39), who had conducted the dealings with Walker, in which he stated that "at all times and during all negotiations, Walker was insistent that H. E. Seaton was an actual investor and capitalist, and never at any time in writing or by information did affiant understand that Seaton was not actually interested until affiant read

Walker's affidavit in which Walker declared that Seaton was a mere nominee"—meaning the affidavit filed on the application for injunction and before the filing of the amended bill, and which led to the amendment with reference to Seaton. Clapp had already testified that "Walker never stated that Seaton was a dummy or a nominee of himself, nor anything like it. He did not mention the use of a nominee or dummy at all. Seaton was to be the principal of the deal." (R. 56.)

The evidence is overwhelming that Mr. Clapp and the officers of complainant understood the status of Seaton just as Clapp states it. They all acted upon that theory. The original bill, a vertified, serious document prepared by counsel upon information furnished by Mr. Clapp, was framed upon that theory and the amended bill conformed to the changed understanding. It is absurd to assert that complainant was dealing, knowingly, with make-believes or dummies; there was no known or apparent reason for doing so and no sense in doing so, whatever may have been Walker's own purpose or idea.

We submit that the tendered amended and supplemental bill, which is duly verified, and the affidavits in support of it present such a *prima facie* case with reference to Seaton's status and actions that the bill should have been traversed by an answer, if at all, and not by ex parte affidavits, so that the witnesses could be brought before the Court for examination and cross-examination, if Seaton's status has the importance which we attach to it.

IMPORTANCE OF SEATON'S STATUS

The district judge did not announce any opinion in passing upon the motion, but his question, "What dif-

ference does it make?" whether or not Seaton was Walker's agent, or had authorized Walker to act for him, or whether or not he had signed a transfer of the notes, implied that it made no difference. And so, we conceive that his Honor was in error.

It makes the difference that if the note in question is not voidable for want of consideration, none having passed from Seaton, and is not invalid or inoperative for other reasons, Seaton and not the Mortgage Corporation of America is the owner of this note.

In asking the above question the Court probably had in mind the principle of the law of commercial paper, that where the maker of a note or bill makes the same payable to a purely fictitious payee or to an existing person who has no interest in the bill or note, the paper becomes in effect payable to bearer. But to have this effect the maker *must know* at the time, that the payee is non-existent or has no interest in the matter. The authorities to this effect are multitude.

In *Corpus Juris* (8 C. J. Section 305) it is said:

> "Whether the paper is to be considered as having a fictitious payee depends on the knowledge or the intention of the party against whom it is attempted to assert the rule, and not on the actual existence or non-existence of a payee of the same name as that inserted in the instrument."

It is further said that under the negotiable instrument law the bearer of a check made to a fictitious payee cannot recover unless he proves that the maker *had knowledge* of the fiction.

Boles vs. Harding, 201 Mass. 103, 72 N. E. 481.

A note payable to the order of a fictitious or non-

existing person, *such fact being known* to the person making it, is payable to bearer.

McLaughlin, Gormley-King Co. vs. Hauser, (Iowa 1923) 191 N. W. 880.

It is only when the maker of a negotiable instrument *knows* that he is making it payable to a fictitious person that such note may be treated as payable to bearer.

Seaboard National Bank vs. Bank of America, 193 N. W. 26, 22 LRA (N. S.) 499.

The rule that a negotiable instrument made payable to a fictitious person is payable to bearer applies only where the maker *knowingly* makes it payable to a fictitious person.

Armstrong vs. Pomeroy National Bank, 46 Ohio St., 512, 22 N. E. 866, 6 LRA 625.

A check made payable to a fictitious or non-existing person *with knowledge that no such person exists* makes the check payable to bearer.

Snyder vs. Corn Exchange National Bank, 70, 167, 100 Atl. 269.

ENDORSEMENT OF NAME OF FICTITIOUS PAYEE DOES NOT PASS TITLE

Where the fictitious character or the non-existence of payee was not known to the maker of a note so as to make it payable to bearer, no one is authorized to endorse the note in the name of the fictitious or non-existing person, and a purported endorsement in such a case is without authority and inoperative.

McLaughlin, Gormley-King Co. vs. Hauser, Supra.

> "The forgery of the name of payee of a bill or note is a good defense to the action against him, even by a bona fide holder for value before maturity, as no title can be acquired by such endorsement.

> Thus where a draft was made payable to a fictitious person, without the drawer's knowledge, the endorsement of such fictitious person's name by the purchaser of the draft would be a forgery, and would confer no title."

2 Defenses to Commercial Paper, Joyce, Section 196.

Corpus Juris (8 C. J. P. 179) after defining liability of the maker of a note or bill in certain cases says:

> "But if the payee is a real person intended by the drawer to be the payee, he is not a fictitious person, and the drawer is not liable to one who claims under a forged endorsement of the payee's name, although the payee really had no interest in the instrument."

Citing, *Vinden vs. Hughes,* 1. K. B. 795.

When the notes in question in this case were made by the complainant, complainant's agents fully supposed that the payee was an actual person and had *an actual interest* and was to become the owner of the notes and all benefits under the deeds of trust, and was to supply funds needed for constructing the building in question. The status of the notes was then and there fixed, whether in fact the payee intended to be an actual factor in the transaction or was intended to have no interest or had no knowledge of the making of the notes, and the endorsement or assignment of the note in his name, if not made by him, was *in law* a forgery, especially since it is now shown that Seaton was and is an actual person, and the purported assignment was and is *wholly inoperative* and the defendants have no right under the note nor under the deed of trust given to secure the note.

This situation, not disclosed until the hearing, and which could not have been discovered sooner, certainly was one proper to be considered by the court and the

amended and supplemental bill should have been received and filed.

ENFORCEMENT OF UNAUTHORIZED CHARGES BY FORECLOSURE OF TRUST DEED

After the filing of the amended bill and after the dismissal of it, the defendants proceeded to foreclose the deed of trust, not merely for the full $12,500 and interest and some trifling expenses, as in the first notice of sale, but for the sum of $15,729.37, of which the sum of $2,579.43 was money which the trustee declared the Mortgage Company had been obliged to pay out and advance "for the purpose of protecting the interests of said trust" and "in accordance with the terms of said trust deed."

No statement of the particular items of expense nor of the particular purposes of the payments or advances nor of the needs therefor was made in the foreclosure notice, but the proposed amended and supplemental bill states that $2,000.00 of the sum charged against the complainant, the trustor, and its land was for counsel fees allowed by the Mortgage Company to its attorneys for defending this suit—of course only before the district court in the proceedings up to the dismissal of the amended bill, upon motion. This statement is not controverted; nor is the further statement of the bill that the charge "was made, fixed, allowed, and paid (if paid) without the consent, authority, or knowledge of" complainant, (R. 26).

The only authority which the trustee in the trust deed or the beneficiary therein had to pay any money for any

purpose at the cost of the trustor is the deed itself, and that authorizes only the payment of all liens upon the property, including interest due, "which may in their judgment affect said property or these trusts, for the benefit and at the expense of said party of the first part," and "to defend any suit or proceeding that they may consider proper to protect *the title to said property,*" and to pay insurance (R. 99-100).

Whatever discretion the expression "may consider proper" may be deemed to give, it can only relate to suits in which the title is involved, the defense being in the interest of the trustor as well as of the creditors' security. And that discretion, being a *trust,* is not to be exercised arbitrarily, but cautiously, judiciously and in good faith, having especially in view the interests of the one who imposes the trust—the trustor.

The only suit pending or brought, in any way touching the trust property, since the trust deed was executed is this very suit, and it is needless to say that this suit does not menace or affect the title to the property and is nowise directed against it, but is aimed at the defendants and the note they hold, and that in defending this suit they are not defending or protecting *the title to the trust property.*

The maker of a trust deed intended merely to secure the payment of a debt would place himself in a position of undreampt of and unlimited peril, if the trustee, without his concurrence, consent or knowledge, or even against his protest, could successfully claim and exercise the power to pay all the defendants' expenses, whatever he might choose to declare them to be, of defending suits by the trustor against the beneficiary. Such a power

would certainly be a mighty effective suppressor of litigation; it would be cheaper to submit to the first wrong and extortion than to take arms against it.

This case is an illustration. The Complainant thought that it should have some accounting for the $11,965.00 claim assigned by complainant to the then holder of the $12,500.00 note and by him assigned to and held and retained by defendant, Mortgage Corporation, but upon defendants' objection the district judge thought otherwise and dismissed the suit. Thereupon the trustee adds $2,000.00 to the Mortgage Company's demand. Complainant appealed and this Court disagreed with the district court. The case went back, and the district court remained of its former opinion, and straightway the trustee added $3,818.02 to the previous allowance to the Mortgage Corporation. That is what the trustee proposes complainant shall pay the defendants for proving by this Court that the defendants and the district court were wrong. It would have cost complainant only the face of the note and $3,229.37 to accept the decision of the district court—now it is $7,047.39. Appellant may well contemplate with trepidation the cupidity of the Mortgage Corporation, and the liberality of the trustee, if this Court shall decide that the district court, after all, was right.

We submit that the district court erred in rejecting the amended and supplemental bill.

ERRORS COMMITTED AT THE HEARING

THE "OFFSET STATEMENT," Defendant's Exhibit C (R. 107), was admitted in evidence as an estoppel

against the assertion of any claim of credit on account of the $11,965.00 account assigned by complainant and held by the Mortgage Corporation. The admission of the paper for that or any purpose was error.

(a) It does not appear that the secretary of the Paramount Company had any authority to execute any such paper, and certainly no such authority existed in him merely by virtue of his office.

(b) The communication is addressed, not to Mortgage Corporation of America nor even to Walker, but to *Union Bank & Trust Company,* a stranger to all the transactions involved in this suit and unconnected with any of the parties or their affairs. Representations to operate an estoppel in any case must be made to the party setting up the estoppel or to his privies in title and not to strangers.

(c) No estoppel was pleaded; the answer merely states that such a paper was executed and does not state how the Mortgage Corporation came by it; that it was made with the fraudulent or other purpose to influence the corporation to purchase the note; that that corporation relied upon anything stated in it, or altered its position in any way or did or omitted anything by reason of it, or was influenced by it or even knew of its existence. And the paper shows upon its face that none of these essential elements of estoppel *could have been alleged* or *existed,* for the paper declares that "the said note and trust deed *have been assigned* and that the new owner's name is the Mortgage Corporation of America;" and the Mortgage Corporation could not possibly have been misled as to the $11,965 account, for it purchased that along

with the notes and could not have been influenced by the paper or its contents. The paper was not admissible under the pleadings. We do not deem it needful to cite authorities in support of these elementary principles of estoppel.

Walker, when on the witness stand, stated that he received this paper from Mr. Clapp, and that very likely he told him that he had sold the note and deed of trust to the Mortgage Corporation (R. 78), and complainant moved to strike it out for the reason that the sale and purchase had already been made when Walker received the paper, and for other reasons stated, but the court overruled the motion (R. 79).

Mr. Clapp, who as managing director, had conducted all the dealings with Walker, testified that he never saw this paper until the day of his testifying (R. 63). And Norton, the former secretary whose name appears on it, seems to have known nothing about it (*R.* 63).

"An estoppel must be certain to every intent."

Gilmer v. Poindexter, 10 How. 257, 268;
Russel v. Place, 94 U. S. 606, 610;
McCarthy v. Lehigh Valley R. R. Co., 160 U. S. 110, 120.

But this paper is surrounded by confusion and uncertainty as to pretty much everything except that it could not have influenced the action of the defendants, but must have influenced the final decision of the court.

THE NOTICE OF COMPLETION (R. 108), is immaterial to any issue in the case and was improperly admitted in evidence. Nothing depended upon the time or fact of completion of the building or whether or not it had been completed.

THE STOP ORDER (R. 70), was erroneously admitted in evidence, being incompetent and immaterial to any issue in the case.

The order is from one F. S. Lack directed to the Bank of America and dated January 18th, 1926. It purports to forbid the payment of any money out of the improvement fund of Trust 243 (which is the fund of which 40%, up to the sum of $11,965.00, had been assigned to Paramount Motors Corporation of the Pacific and by it assigned to Walker) without Lack's approval first had; but directs the payment of certain small accounts.

If Lack, beneficiary of the trust, had any control over said fund, obviously he had none over that portion of it which had long theretofore been assigned in payment of a valid claim for money borrowed and of which assignment the Bank was advised, and payment of which had been authorized by the "Agent of the Beneficiary," (R. 105) appointed such by the trust agreement (R. 125); and it does not appear that any such control was attempted or intended. If the Bank suspended payment of any part of the fund so assigned, what right had it to do so? And how could Paramount Motors Corporation be responsible for such action of the Bank? Any effect which the Court gave to this paper was erroneously given.

OTHER ERRORS

The other errors committed by the court consist of the findings and the final decision of the case.

This Court held, upon the former appeal, that the amended bill, which the district court had dismissed for "want of equity," plainly stated a case entitling the complainant to equitable relief. That point is settled; it is

the law of the case. And it settles and establishes, as the law of the case, complainant's contention that complainant is entitled to the same relief against the Mortgage Corporation, Walker's assignee, to which it would have been entitled against Walker, had there been no assignment by him.

But the Court below holds that complainant has not maintained the material allegation of the amended bill, and especially finds that "any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment," (R. 42). This, of course, refers to the $11,965.00 matter.

The most of the allegations of the amended bill were in substance admitted and alleged by the answer, and all allegations—setting aside for the moment the assignment matter— were proved. The jurisdictional averments were not denied and the facts appear. Complainant introduced in evidence its Articles of Incorporation (R. 53), the Building Contract with Walker (R. 90), and the execution thereof (R. 51), and the Resolution of the Board of Directors authorizing the same (R. 94), and the execution of the notes and Trust Deeds to Seaton (R. 96), and it was admitted that complainant received no money and no consideration therefor except the building contract (R. 51). The assignment of the $12,500 note by Seaton to Walker is shown by the copy in the answer (R. 13), and Mr. Clapp testified that Walker told him that Seaton was to furnish him, Walker, the $17,000.00 to construct the building, but he had been unable to do so and witness suggested that Walker have Seaton assign the note to whoever would furnish the

money. The assignment of the $11,965.00 account by Paramount Motors to Walker (R. 96) was delivered to Walker by witness Clapp, who has not since seen it, but understands it was placed in the Bank of America which was administering the funds upon which it was drawn (R. 52). The assignments introduced by defendants show that the original was in the hands of the Bank (R. 130). It was stipulated that proceedings to foreclose the $12,500.00 trust deed had been begun.

THE $11,965.00 ACCOUNT

The trial of the cause centered about the nature and purpose of, and the effect to be given to, the assignment by the complainant to Theron Walker Engineering & Construction Company of the debt of $11,965.00 payable to complainant out of funds coming into the Bank of America from the sale of lots in Paramount Heights, Azusa, California, under a trust designated as Trust No. 243, the sum representing moneys loaned by complainant to the Trust or the subdivision enterprise. The complainant contended that the assignment was an absolute transfer of the account in partial payment of complainant's notes held by Walker, and the defendants contended that it was merely collateral security for those notes.

The district court agreed with the defendants' contention and considered that the settlement of that question settled the case. We urge that the court was in error in both respects. If the assignment was not as mere security for the notes, the decree of the court is erroneous; and if it was mere security, still the decree is erroneous.

PRACTICAL CONSTRUCTION OF THE ASSIGNMENT

We are unable to find in the evidence support for the court's finding; there is no evidence except the present statement of Walker that it was taken as security. But what Walker said and did about the time of the transaction and the conduct of the parties *ante litem motam* is a safer guide than what it may now please Walker to say or think.

In 4 Ency. U. S. Supreme Court Reports, page 571, the rule of "practical construction" is stated as follows:

> It is a fundamental rule that in the construction of contracts if the language is doubtful, the courts in ascertaining the meaning of the parties, especially as to the subject matter, should look not only to the language employed, but (1) to the subject matter, (2) the conduct, (3) and situation of the parties as between themselves and with relation to the subject matter, and the surrounding facts and circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. The transaction must necessarily be held to have been entered into with the intention to produce its natural result.

And as to construction by "conduct," there is cited:

> *Old Jordan M. Co. vs. Societe des Mines,* 164 U. S. 261 (270);
> *Lowber vs. Bangs,* 2 Wall. 728 (737);
> *Lowrey vs. Hawaii,* 206 U. S. 215.

And at page 574 it is further said, citing the same cases and others:

> In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.

Adding also:

> Where the parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction.
>
> *Pine River Logging Co. v. United States,* 186 U. S. 279 (290).

In line with this rule, the Supreme Court of California has declared as follows:

> The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal. (Beach on Modern Law of Contracts, secs. 721, 724; 2 Wharton on Contracts, Sec. 653.) "Tell me," said Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what it means." (Attorney General vs. Drummond, 1 Dru. & Walsh 353; H. L. Cas. 837.)
>
> *Keith vs. Electrical Eng. Co.,* 136 Cal. 178 (181); *Williams vs. Ashurst Oil Co.,* 144 Cal. 619 (624).
>
> "Contemporaneous, prior and subsequent conduct and declarations of the parties may be considered in determining the nature of a transaction, as whether a deed was meant as an advancement."
>
> *Neil vs. Flynn Lumber Company,* (W. Va.) 95 S. E. 523.

Consider then the assignment itself and the conduct of the parties in reference to it.

In the first place, the notes were amply secured by the land and by the building, which was to be of the same value as the face of the notes, to be placed upon it. The notes purport to be secured by the deed of trust (R. 12) and not otherwise. There is no reference in the assignment itself to any purpose of security, and there is no reason why additional security should voluntarily have been given Walker, back into whose hands the notes had come. Complainant had secured the contract for the building and had executed its notes and trust

deeds therefor. Complainant's obligations to *secure* the notes had ended; but its obligations to *pay* remained. Provision for that was made.

Now how did Walker understand the transaction *at and after the time it was made?* We have his own evidence upon that point, Defendants' Exhibit K (R. 144), put it in evidence *by the defendants themselves,* and consequently conclusive upon them.

On his own letterhead, advertising his activities, he has prepared and promulgated his prospectus of the "Paramount Motors Project" of which Thereon Walker Engineering & Construction Company is "Manager of Construction." He represents Paramount Motors Corporation as owning 160 acres of land, 100 acres of which is being subdivided into lots for sale, and should bring $400,000.00, about $100,000.00 worth having already been sold, and the money is being paid into the Bank of America and part of it used for the construction of factory buildings, and 20 acres of the land has been placed under a $17,000.00 mortgage to build the first unit, a story and a half building, which has been leased. The prospectus proceeds:

> *Land:* The land is variously appraised at from $900 to $1000 an acre and we are informed that it has been assessed by the County Assessor at $600 per acre.
>
> *Value:* Contract price of the building is $17,000.
>
> *Owner's Value of Land:* $800 per acre—total $16,000, making a total valuation as security of $33,000.
>
> *Re-Payment:* In addition to the land and building as security, arrangements have been made for 40% of all money received from subdivision over selling cost of 15% to apply on this loan through the Bank

> of America. On existing contracts at present in the bank, it is estimated that this should run over $500 a month. In addition to that, an assignment of the lease has been made and this $300 per month will also accrue to the re-payment of the loan. Of the contract price, a first trust deed in the amount of $12,500, dated December 1, 1924, has been placed on, with re-payment of $800 per month, to commence on same under date of August 1, 1925, and continue monthly thereafter until December 1, 1925, on which date the remaining balance is made due and payable. This trust deed carries 8% interest.

The prospectus states that a second trust deed for $4,500.00 has been placed on the property, and states:

> "It is anticipated by the Paramount Motors Corporation that this *entire loan of* $17,000 will be liquidated *in the very near future by the sale of lots* and that arrangements can satisfactorily be made to start the construction of the remaining units of their plant by March 1, 1925."

The $11,965.00 assigned to Walker is part of the 40% of the proceeds of lot-sales mentioned. And the "arrangements" about the 40% is a *repayment* arrangement; the money received is to "apply on this loan"—the $17,000.00 in notes. The land and the building are the *security.*

And Walker says that the Paramount Corporation expected the whole $17,000.00 to be liquidated "in the very near future by the sale of lots." That was Walker's expectation, and he proceeded accordingly to apply the $11,965.00, as he had accepted it, *in payment on said notes.*

Instead of assigning the $11,965.00 account in its entirety along with either deed of trust and "as col-

lateral only, and not as payment," and instead of waiting *until default in the notes had been made,* and then taking steps *to foreclose* on the "collateral," Walker directed the Bank of America, the holder of the fund, to pay off the $4,500.00 note, held by Roper, (R. 132-133), and then assigned the account, except $4,500.00, "which is first to be deducted from the amount of $11,965.00 and made payable in favor of" the $4,500.00 note (R. 130). And in furtherance of the assignment, Walker authorizes the Bank of America to make all payments, out of the account assigned, to Mortgage Corporation of America, the owner of said $12,500.00 trust deed, until the Mortgage Corporation "shall have received from the Bank of America full amount of said assignment, less such amount as has been paid on the second trust deed." (R. 131). It is admitted that the $4,500.00 note at least has been extinguished out of the $11,965.00 fund.

It is submitted that all this is a queer way to deal with mere "collateral security" and shows plainly that not only Walker but Mortgage Corporation of America when they took this account, and dealt with it as they did, took it as payment on the notes, as complainant intended and understood it to be, and never for a moment supposed it to be, as they never for one moment treated it, a mere security for a debt. Their altered interest cannot now alter the nature of the transaction.

Be it remembered that the defendants *still hold the assigned claim* and have never even offered to re-assign or surrender it or any part of it, and the court did not require them to do so or account for it in any way, although holding it to be only "collateral," before per-

mitting them to go on and sell complainant's land for whatever they pleased to claim.

THE DECREE ERRONEOUS EVEN IF THE ASSIGNMENT WAS AS COLLATERAL

We submit that the finding of the court below that complainant assigned the $11,965.00 account to Walker as collateral security is not supported by any appreciable evidence but is contrary to all the evidence; but if it is properly to be considered merely as security, still the decree and the decision of the case are erroneous.

In any case, complainant was entitled, in a court of equity, to some accounting for the claim. Before resorting to a sale of complainant's land, the defendants should have been compelled to exhaust the collateral, personal security, and reduce the amount due upon the note as much as possible. Or at least they should have been required to surrender it. The Anglo Saxon, man or court, has always clung tenaciously to *land*—everything else must be exhausted before than can be touched. It is a wholesome policy, but the court below lost sight of it, and that, we submit, constituted error if no greater one was committed.

CONCLUSION

We respectfully submit that the learned district judge must have been misled by evidence improperly admitted and misinterpreted that which was properly before him, and that the findings and decree of the court below should be reversed and court directed to entertain an amended and supplemental bill.

We urge that Seaton was an element in the note transaction that vitiated the notes, and that whatever valid claims the defendants may have, if any, against complainant must rest upon the building contract and the work done under it and not upon the notes they hold; and the pleadings and records are not in condition to determine such claims.

We beg the Court to consider the plight of appellant, which would be made worse by affirmance of this decree. Appellant began with an obligation of $17,000.00, towards the payment of which it turned over a valid and valuable account receivable of $11,965.00. After that the appellees began foreclosure to enforce payment of about $13,000.00, which, with no new engagement or obligation or liability on appellant's part, was later boosted to $15,729.37 and a little later to $19,547.89. When this Court stayed the threatened sale for the enforcement of the demand for the latter sum, it required of appellant a bond, (which was given) conditioned for this prompt payment of $2,500.00 to appellees upon account, if this Court should affirm the decree appealed from.

What, then, would be the effect of affirmance? Appellant would have to pay the $2,500.00 to appellees, and they would still be more free than before to sell appellant's land to coerce the payment not merely of the sum previously demanded but any sum to which they might please to advance their previous demands. And unless appellant should be able, within some thirty days, to meet whatever the appellees might demand, appellant would be cleaned up of the land and building, the $11,965.00 and $2,500.00 besides.

From such a predicament and calamity surely this Court will save us.

Respectfully submitted,

MAYNARD F. STILES,

CAESAR A. ROBERTS,

For Appellant.

No. 5280.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Paramount Motors Corporation of the Pacific, a corporation,

Complainant below,
Appellant,

vs.

Title Guarantee & Trust Company, a corporation; The Mortgage Corporation of America, a corporation, and Theron Walker, styling himself and doing business as Theron Walker Engineering & Construction Company,

Defendants below,
Appellees.

APPELLEES' BRIEF.

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CLORE WARNE,
Solicitors for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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APPELLEES' BRIEF.

STATEMENT OF THE CASE.

This is an appeal by the complainant from a decree of the District Court after trial upon the merits against the complainant and in favor of the defendants appear-

ing. [Tr. p. 41.] The decree in effect dismissed the amended bill of complaint and ordered judgment in favor of the said defendants. There was a general finding of the court after said trial set forth in the decree. We will analyze the pleadings so that the precise issues before the trial court may be properly presented.

The Pleadings.

The amended complaint upon which the whole action of the complainant is premised is not set forth in the transcript of record filed in this court upon this appeal. For the convenience of the court and in order that it may be properly before the court for consideration, we have attached the same in full as of appendix to this brief. It is in the same form as set forth in prior appeal of this case being No. 4858 of this court.

Said amended complaint after jurisdictional allegations, avers that complainant was created and organized for the purpose of acquiring, owning, holding and selling real estate and engaging in manufacture, and that it had "acquired an interest in a certain tract of land situated at Azusa, California" which had been subdivided and was being sold on time payments under the designation of Subdivision No. 8507, also known as Paramount Heights Subdivision, to which subdivision complainant had advanced the sum of $11,965.00, which was to be repaid to complainant under a trust arrangement being conducted through The Bank of America at Los Angeles out of proceeds of sale of lots in said subdivision. That complainant also owned a 20-acre parcel, in the amended complaint described. That complainant desired to construct upon the 20 acres a build-

ing for its manufacturing purposes, and entered into negotiations with one Theron Walker who prepared plans and specifications therefor, and estimated the cost of such building at $17,000.00. That afterwards, complainant entered into a contract with said Walker for the construction of the said building. That prior to making said contract Walker had represented to complainant that one H. T. Seaton would provide the money for financing said building taking the note of complainant for said $17,000.00, and accordingly, complainant at the instance of Walker executed to Seaton a promissory note dated December 1, 1924, in the principal sum of $12,-500.00, payable in installments, said note being secured by deed of trust of even date to the defendants, Title Guarantee & Trust Company, as trustee, for the benefit of said Seaton. (Said $12,500.00 note and trust deed being the subject matter of the instant action.) That at the same time, complainant executed to Seaton a note in the sum of $4,500.00, payable in installments, secured by second deed of trust to the same trustee upon said 20 acres of land. That Seaton failed to pay complainant any money or produce any money for the financing of said building project, and that on or about the 4th day of December Seaton assigned the said notes and deeds of trust to Theron Walker, doing business as the Theron Walker Engineering & Construction Co. That said Seaton was the "nominee and agent" of said Walker in said note and trust deed transaction, and not an independent actor. That said note having come into the hands of Walker, complainant executed and delivered to Walker an instrument in writing assigning and transferring to him the said claim and demand of the $11,-

965.00 as payment *pro tanto* upon said note, and that complainant caused notice of said assignment to be given to the Bank of America which was receiving and disbursing the proceeds of said lot sale. That said Walker filed said assignment with the Bank of America and that subsequent to said assignment all payments upon said trust account had been made to Walker or his assigns. That thereafter about December 18th, Walker assigned said $12,500.00 note and trust deed to the defendant, Mortgage Corporation of America (hereafter for brevity called Mortgage Corporation), and also assigned to said Mortgage Corporation the claim so assigned to him designated to be in the sum of $11,965. That complainant paid to defendant, Mortgage Corporation the sum of $750 in cash, being three payments of $250 each due on quarterly interest. That Seaton paid no money to complainant for said note and Walker paid no money to Seaton for the assignment of said note to him. That defendant, Mortgage Corporation, paid Walker no money for said note, but took assignment from Walker upon some agreement to pay construction bills accruing from the construction of the factory building of complainant. That at the time of the assignment of said $11,965.00 account to Walker as payment *pro tanto* upon said two notes of $12,500.00 and $4,500.00, complainant gave no directions to the said Walker as to the particular distribution and application of said payment between the two said notes, complainant is informed and assumes the fact to be that part of said payment had been applied to and "has extinguished said $4,500.00 note" leaving $11,465.00 to be applied on the $12,500.00 and that not more than $5000.00 of

the principal and a small amount of interest was due on the $12,500.00 note. That notwithstanding said alleged facts, the defendant, Mortgage Corporation, demanded the full sum of $12,500.00 together with certain interest, and upon failure of complainant to pay the same gave notice to the defendant, Title Guarantee & Trust Company, trustee, to foreclose said deed of trust. That notices have been given in due course and a sale was set. That complainant is able, willing and ready to pay whatever sums that may be justly due.

There is a prayer for an accounting and for injunctive relief pending the said accounting, said injunctive relief being sought to prevent the sale of the property. The answer of the defendants, Title Guarantee & Trust Company, a corporation, and Mortgage Corporation of America, a corporation [Tr. p. 4, *et seq.*], duly verified, specifically denies the material allegations of said amended complaint. In the third and separate defense to said amended complaint [Tr. p. 10, *et seq.*), there is set up the true state of facts surrounding the transaction. These facts are alleged substantially as follows:

That about the 24th day of November, 1924, complainant was desirous of constructing a building upon said 20 acres, and entered into a building contract with Theron Walker, whereby Walker contracted to erect a building according to plans agreed upon for a total consideration of $17,000.00 *to be paid* by complainant to Walker by delivery of a promissory note in the sum of $12,500.00 secured by a first deed of trust upon said 20 acres and the remaining portion of said contract price by a promissory note in the sum of $4,500.00 to be secured by a second deed of trust upon said property

and that Walker was to receive said note and trust deed *in full payment* for work, labor and materials to be furnished for the erection of said building. That thereafter, and about December 1st, complainant made, executed and delivered to Walker as part payment of the consideration under said contract, his promissory note in the sum of $12,500.00, payable to a nominee of said Walker, one H. E. Seaton, which promissory note was secured by a deed of trust upon said 20 acres, together with certain indorsements thereon as introduced in evidence upon the trial, is set forth in *haec verba* [Tr. pp. 12 & 13]. That the payee named in said $12,500.00 promissory note and as beneficiary under said deed of trust, to-wit: said Seaton, duly assigned said promissory note and said deed of trust to said Walker. That thereafter and about December 18, 1924, in the regular course of business, said Walker offered for sale to the defendant, Mortgage Corporation the said $12,500.00 promissory note of complainant secured by said deed of trust. That thereupon, said Walker sold and the defendant Mortgage Corporation bought said promissory note and trust deed and paid the said Walker the sum of $10,000.00 therefor, in certain sums to be paid out to said Walker as said building was progressively completed, final payment to be made to Walker after notice of completion had been duly filed, and a mechanic's lien guarantee had been furnished showing the premises free of all mechanic's and materialmen's liens. That at the time said sale was made by said Walker to the defendant, Mortgage Corporation, complainant signed and executed a certain off-set statement and caused the same to be delivered to said Mortgage Corporation of

America [Tr. p. 15], which said off-set statement recited that the unpaid balance of the note secured by trust deed was $12,500, that the interest upon said note has not been paid and that complainant had no off-set or defense against said note. That said $12,500.00 promissory note by its terms provided for the payment of $800 or more on the first day of each and every month beginning August 1, 1925, and continuing until December 1, 1925, on which date the remaining unpaid balance of $9300 is required to be paid. That there was due on said promissory note according to the terms thereof the sum of $800 on August 1, 1925, September 1, 1925 and October 1, 1925, together with the interest thereon at the rate of 8% per annum, payable quarterly. That complainant regularly paid the quarterly installments of interest due upon said $12,500 promissory note to and until the 1st day of September, 1925. That no payments were ever made upon the principal of said note, and that after default had been made as aforesaid, complaint after demand duly made proceeded to foreclose said deed of trust in the manner provided by its terms. That no part of the sums due upon said promissory note have ever been paid, except the payments of quarterly interest installments as stated.

The Trial.

Trial was regularly had before Hon. Edward J. Henning, District Judge, and occupied approximately 2 days. No service was made upon and no appearance was made by any other defendant named. Considerable oral testimony was given by various parties on behalf of the plaintiff and the two appearing defendants, and documentary

evidence was introduced. The pertinent portion of such testimony and evidence is set forth in the "Statement of the Evidence" [Tr. p. 50, *et seq.*] We do not discuss the evidence at this point, in view of the rule of this court, governing the scope of review in appellate court where the findings are general, as they are in this case, in the case of *Societe Nouvelle d'Armement v. Barnaby,* 246 Fed. 68, 71. The one special finding made by the trial court is urged as error by appellant and we shall discuss the evidence with reference thereto in reply to the argument made by appellant.

Decree.

The decree [Tr. p. 41] after proper recital, contains by way of finding, the following:

"The court hereby finds that the plaintiff has not maintained the material allegations of its amended bill by a preponderance of evidence, and specifically finds that any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment; and therefore, * * *."

Thereafter is set forth the decree proper adjudicating the rights of the parties.

(**Note:** Hereinafter the complainant below is termed appellant and the defendants, Title Guarantee and Trust Company, a corporation, and Mortgage Corporation of America, a corporation, are termed appellees. As stated heretofore, the appellee Mortgage Corporation of America is referred to herein as Mortgage Corporation. All italics appearing is ours unless otherwise designated.)

RESPONDENTS' POINTS AND AUTHORITIES.

As stated heretofore, the material allegations of the amended bill of appellant were not proven. Although such allegations had been specifically denied in the answer

filed by appellees, we shall not burden the record and the court with detailing the insufficiency of the evidence with regard thereto. With respect to the particular and specific finding as to the matter of assignment, we shall point out to the court evidence amply supporting the same. We shall then proceed to reply to the argument of counsel as to other alleged errors of the trial court.

APPELLEES' POINT 1.

Evidence Conclusive That Assignment of $11,965 Item Was Not as Payment.

The evidence is conclusive to the effect that the assignment of the $11,965 *claim* of the appellant was not as payment *pro tanto* of the $12,500 note or of any note. On the contrary, such evidence as introduced all goes to show that said assignment was as *additional security* to secure the payment of the $12,500 note and the $4,500 note also mentioned. Also, it is to be noted that it was only to be credited upon said obligation *"when paid."* We will cite the record to substantiate our statement.

Theron Walker testified on behalf of defendants that he was engaged in the contracting and engineering business about November 28, 1924, under the name "Theron Walker Engineering & Construction Company" [Tr. p. 75]. Mr. Clapp, an associate, brought documents including rough sketches for building and plan of operation, including a "set up" to him. [Tr. p. 77.] Clapp and his associates were willing to deed the land and provide a lease and such other assignments, etc.; and in order to provide for the payment required by the note. Mr. Clapp told the witness [Tr. p. 78]:

"He could get me a lease on that building for $300 a month, and assign the lease to me to collect it; that in addition to that they had a couple of hundred dollars a month coming in from the sale of lots from an improvement fund, and that he would give me that, and that I could apply that against it."

There was then introduced [Tr. p. 78] Defendant's "Exhibit K," a portion of which was on the letter head of the Paramount Motors Corporation of the Pacific, appellant here, and dated Nov. 1, 1924. [Said exhibit is found in the transcript, page 144.] To quote from particular portions of said instrument, we have the following [Tr. p. 147]:

"Repayment: In addition to land and building as security will arrange for 40% of all money received from subdivision over selling cost of 15% to apply on loan through Bank of America. This now on contracts in bank will run over $500 a month. This up to $12,000 to $13,000. Being an amount the corporation has put up in cash for improvements on subdivision. * * *

"Remarks: The 20 acres may be deeded to an individual or trustee or corporation as desired, and contract for remaining security made with corporation and lease rights may be put up also or payments made thereunder."

It will be noted that Theron Walker in presenting this matter to the defendant and appellee, Mortgage Corporation of America copied almost verbatim the statements contained in the prospectus and letter of appellant. This is also contained as a part of said Defendant's Exhibit K [Tr. p. 145].

The witness Walker further testified that he received the "owner's off-set statement" [Exhibit C] from Mr.

Clapp and that "Up to the time he delivered or mailed this paper to Mortgage Corporation of America, he had received no money from that corporation by virtue of the assignment of the note and deed of trust." [Tr. p. 79]; and also [Tr. p. 79]:

"In addition to the offset statement and note the deed of trust, there was delivered to Mortgage Corporation of America the lease on the proposed building, including the assignment of the $300.00 a month that was supposed to come from it, also the assignment of certain moneys that were anticipated coming into the Bank of America which had been assigned to witness as guaranteeing these monthly payments, which witness assigned to Mortgage Corporation of America, and also a guarantee to them that they would get their monthly payments; also delivered to Mortgage Corporation of America a certificate of title which was delivered before witness received any money on the trust deed note."

During the course of the cross-examination the court made specific inquiry of the witness with reference to the matter of the assignment and the same appears in the record as follows [Tr. p. 81]:

"The Court: I would like to know when the assignment for the improvement fund was delivered to him, with reference to the other transactions, if he knows.

"The Witness: I can tell you, Your Honor.

"Q. By Mr. Cohn: And give all conversations also in connection therewith.

"A. When Mr. Clapp and his directors came to my office, that was when this was taken up. I said, I believe—I won't go into that either. The gentleman is not here. I told him, 'There are certain things that I must have before I can write this paper up and take the contract of this building. I must have an authority

from your corporation to write these notes, and I must have, according to your own written statement in front of me here, which you offer as additional security, that assignment that you have in the bank guaranteeing those payments. I must have that properly signed by your secretary, and a resolution properly taken care of. I must have this lease and I must have this lease guaranteed by someone of responsibility.' Mr. Clapp said he would guarantee it personally, and that he would get another gentleman by the name of Mr. Coffee, who was worth some hundred and some odd thousand dollars, and guarantee it, both guaranteeing that if Porter didn't pay that $300 a month, that they would pay it, and that would apply to the $800. I asked them, 'How much have you got coming from this improvement fund at the present time in the bank?' They believed it was about four or five hundred dollars a month, about forty per cent of which would have been assigned to me. And they said, 'However, just as soon as you start the building, our lot sales will pick up to such a great extent that it will more than exceed or would more than exceed the $800 a month,' in connection with the $300 that we were to get from the lease. I said, 'Prepare all those papers and bring all those papers to me, and I will draw up the necessary mortgages and trust deeds and we will get started on it.' Then from that time on the papers drifted in back and forth and we held telephone conversations regarding their correctness, and so forth.

"Q. By Mr. Cohn: What, if anything, did Mr. Clapp or his associates in the Paramount Motors Corporation say about the repayment of the principal—this $12,500 note, particularly?

"A. That was all defined before they came to my office in a document that they brought to me, which stated that they only wanted to borrow the money for a year or a year and a half, and could pay it back at the rate of $800 a month. That was their own statement to me.

"Q. And how about the balance after the $800 was paid?

"A. It was to be paid in a lump sum, if there was any unpaid balance due. They were merely asking for a short time loan.

"Nothing was said in the conversation with Mr. Clapp that the delivery to witness of the assignment on the improvement fund would be a payment of the $17,000 notes—that was never mentioned at any time. Mr. Clapp is the one whom witness told he must have the offset statement; never met the secretary who signed it."

Now if we examine the body of the assignment itself—and there is no pleading that the same is vague or uncertain in any particular—we find that it recites and purports to assign certain moneys totaling $11,965 to the Theron Walker Engineering & Construction Company. [See Tr. pp. 95, 96.] It then reads as follows:

"It being understood that all or any portion of said amount *when paid* to Theron Walker Engineering & Construction Co. *shall become a credit* on the principal and interest of said aforementioned loan."

The loan referred to is mentioned in the recital of consideration in the forepart of the memorandum of assignment. Said assigned funds are noted to be payable from improvement funds under trust No. 243, Bank of America.

The resolution of the board of directors of the appellant corporation authorizing the execution of the particular assignment referred to, being certified to by the secretary of said corporation, and appearing in the record as a part of Defendant's Exhibit J [Tr. pp. 136, 137], after reciting the existence of the claim to moneys

due from said trust No. 243, recites in words denoting the intention of said corporation as follows:

"Therefore be it resolved, that the officers, or any of them, of this corporation are hereby authorized, directed and instructed, to assign the aforementioned improvement fund in the amount of $11,965 to Theron Walker Engineering & Construction Company, *to be credited, when and as paid* out of improvement fund under Trust #243, Bank of America, *as payment to that amount on loan of $17,000, therefrom.*"

It will be noted that long after the execution of the alleged assignment as aforesaid and prior to the time that it was purchased by the appellee, Mortgage Corporation, the appellant by its secretary and over the secretary's signature, executed and delivered the offset statement [Tr. p. 107], wherein said appellant recited that it was the owner of the 20 acres referred to and that the unpaid balance of the note secured by the trust deed upon said 20 acres was $12,500, and that said corporation had no offsets, claims nor defense against said note except as stated therein, there being stated no defense whatsoever.

Long after the execution of said purported assignment, the appellant continued to pay interest upon the *total sum of $12,500* evidenced by said promissory note. We will note the testimony of Michael G. Kreinman [Tr. p. 84] who testified that he was president of the Mortgage Corporation of America and that he:

"Had a conversation with Mr. Clapp with reference to payment of interest on the $12,500 note in Clapp's office; called him up and told him the interest should be paid. He said they were hard up but were going to pay in a few days, or something. Had no conversa-

tion in which Clapp said that the corporation would not pay but he would. Received three payments of $250.00 each and they are endorsed on the note. No part of the principal sum has been paid. With reference to payment of the principal sum of $800.00 due August 1st, witness called Mr. Clapp by telephone and told him he would like to have payment and Clapp said that he was arranging to refinance somewhere and would pay the whole amount when due; never said anything about having paid $11,965.00, or any other sum, on account."

While there is some contrary or contradictory testimony offered by the appellant, being the oral testimony of R. E. Clapp [Tr. p. 51, *et seq.*], we submit that such testimony does not at all negative the contention of appellees and the findings of the trial court. We submit that a reading of the testimony of the said Clapp will show specifically evasion and equivocation on his part. It will show that the evidence is conclusive in support of the contention maintained by appellees during the course of the trial, namely: that said assignments of $11,965 was as additional security to the deed of trust and as a means of showing a method of re-payment of the obligation all offered by the appellant as an inducement to a prospective purchaser of the paper. It was thus offered and received by the appellee, Mortgage Corporation. This was in substance the finding of the trial court below and the evidence is overwhelming in support thereof, and there is no shadow of doubt cast by any part of the record on such finding. It will be noted in this regard that counsel for appellant have not sought to point out in any particular where the finding of the trial court on the point is faulty.

It is not contended by counsel for appellants that any sum of money was ever paid to the Mortgage Corporation out of the assigned account. Neither is it shown nor is it even contended by appellant that there was ever any money paid into the hands of the Bank of America out of which any payment could be made to the Mortgage Corporation of America under said assignment. The testimony is specifically to the contrary. C. R. Clute, witness on behalf of defendant, testified that he was assistant trust officer of the Bank of Italy, successor to the Bank of America, and was familiar with the matter of trust #243, purporting to deal with the property in question. That he had a statement of the last two years showing the amount of money received and disbursed under said trust, and that "it shows that no money has been paid to the Mortgage Corporation of America out of the proceeds of said trust—no money has been so paid." [Tr. p. 68.]

APPELLEES' POINT 2.

No Error of Trial Court Shown by Appellant.

We have examined carefully the argument urged by appellant (App. Br. 14) and can hardly regard the same with any idea that it is being seriously urged. It will be noted by the court that the major portion thereof consists in urging error of the trial court in refusing to entertain and allow appellant to file, long after the trial of the action had been concluded, what is termed an "amended and supplemental bill." This occupies some nine pages of appellant's brief.

No Abuse of Discretion Shown.

While the court may at any time, in furtherance of justice, upon such terms as may be just, permit any pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading, (*Equity Rule 19*), it is equally well settled and an elementary principle that the allowance of amendment after the expiration of the time within which such amendment can be made as of course is within the discretion of the trial court (*Bancroft Code Pleading,* 740; *MacDermot v. Hayes,* 175 Cal. 95, 112).

It is also well settled that it is a general rule that the action of the trial court in refusing an amendment to pleading is not subject to review on appeal unless it affirmatively appears that its discretion was abused. (*Bancroft Code Pleading,* 743; *Beers v. Denver & R. G. Co.,* 286 Fed. 886; *General Inv. Co. v. Lake Shore etc. Co.,* 250 Fed. 160, 177.)

Inasmuch as there was no effort whatsoever on the part of the counsel for appellant to point out any error of the trial court, in the nature of abuse of its discretion in the refusing the appellant leave to file the amended and supplemental bill, no duty devolves upon appellees to point out the correctness of the trial judge's procedure. We desire, however, to point out the utterly fallacious position of appellant in the premises.

As to Fictitious Payee.

In this regard it will be noted that the application of appellant in the original amended bill alleged that Seaton was the nominee and agent of Theron Walker. The whole action proceeded upon that theory. Counsel for

appellant during the course of the trial stated many times that the only issue presented to the court was whether or not the assignment was as payment or collateral. The amended complaint and answer thereto presented that as practically the sole issue. Such course of conduct on the part of counsel for the appellant during the trial upon their offer of immaterial evidence caused the trial judge to make this observation as shown by the record [Tr. p. 86]:

"The Court: 'Your statement is in the record many times during this trial, that the only issue is whether or not that assignment was a sale or collateral, and I think that is correct. I think you have stated that correctly, and therefore, under your own statement it would be immaterial, but these are questions that are not at issue here.'"

It will be noted that the amended bill offered for filing was presented long after the evidence upon the trial had been taken [see recitals of amended bill, Tr. p. 24], and the rule is well settled that:

> "except to enable plaintiff to conform his bill to the proof received, amendments will not be permitted after the evidence has been taken unless under very special circumstances or in consequence of some subsequent event, * * * and amendments at that stage must not be such as substantially to change the issues." (21 *Corpus Juris,* 530.)

Of course, it is nothing for the appellant here to about face upon any issue of fact. As was respectfully urged to this court upon prior appeal in this case (this court's No. 4858), such course of conduct on the part of the appellant here was ground for sustaining the rule of the

lower court in dismissing the amended bill. It is pertinent to note here that in the original bill, with reference to the status of said Seaton, there is the positive allegation appearing as follows:

"That on or about the 1st day of December, 1924, at Los Angeles, California, your orator borrowed from the Mortgage Corporation of America, acting under the name of and through the defendant, Seaton, a certain sum of money, to be repaid in sum of $800 or more per month, beginning on the first day of August, 1925, and continuing on the first day of each month thereafter until December 1, 1925, on which date the remaining unpaid balance should be paid, and in evidence of said loan executed to the said defendant, Seaton, its promissory note for the purported principal sum of $12,500 bearing interest at the rate of 8 per cent per annum, payable quarterly, and to secure said note, executed and delivered to the Title Guarantee & Trust Company, as trustee for the defendant, Seaton, *agent of the said Mortgage Corporation of America,* a deed of trust of even date with said note, upon the following described real estate. * * *." (Br. for appellees in case #4858, Appendix p. 2.)

Said original bill was verified by R. E. Clapp, who makes oath and says that he is "managing director of the Paramount Motors Corporation of the Pacific. * * * that as an officer of said company he has knowledge of its business transactions and affairs." Likewise, said Clapp makes verification of the amended bill upon which trial was had and which is premised entirely upon the theory that Seaton was "the nominee and agent" of Walker in said transaction. Likewise, said Clapp makes positive averment in his verification to the proposed amended and supplemental bill, to which argument of

appellant's counsel is directed in its brief. It would seem that this gentleman is a veritable chameleon changing his hue to suit the exigences of any given situation. Perhaps, his conduct is best explained, or at least the reasons therefor, in his own statement to one of counsel for appellees made during the course of the trial and which appears as evidence in this case. Samuel C. Cohn took the witness stand on behalf of the defendant upon the trial and testified that he had a conversation with said Clapp in the court-room after a temporary adjournment. Said conversation is then related by Mr. Cohn [Tr. p. 88]:

"Mr. Clapp came over to me and shook my hand, and I asked him,—I said, 'What is the purpose of all of this procedure that we are going through?' 'Well,' he said, 'we needed more time. We were not able to pay at the time before that occurred.' And I asked him, 'What is the present situation on that subdivision?' And he substantially told me in reference to the ten thousand dollar payment, as he himself testified a few moments ago—I don't remember the exact language, but something to the effect that there was some money coming in.' I said, 'Well, will that enable you to take care of this entire payment due?' He said, 'No; there are other obligations and,' he said, 'we still need more time. And if we should lose in this proceeding, it will be necessary to appeal for the purpose of gaining more time.' And then I told him—I said to him, I said, 'That is rather a foolish viewpoint. It merely increases the expense.' And he said, 'Well, you should not worry about that, that is how you lawyers make your living.'"

Appellant's Estopped to Complain of Validity of Paper.

Even if we would grant the argument of counsel (App. Br. 14, *et seq.*) and the proposition therein contended for that this was a truly fictitious person insofar as this transaction was concerned—a proposition which we do not grant as it is not the fact—appellant would be estopped to claim at this late date that said paper lacks validity by reason of the defect urged.

First, appellant is estopped by the record in this case, the whole of which is premised upon the theory of the execution of valid paper in favor of Seaton as payee, and an alleged payment on account of the obligation so evidenced. As was well stated in a case where, like here, the appellant sought to jump from pillar to post, "plaintiff cannot be allowed to change his legal position as the wind changes." (*Davis v. Winona Wagon Co.,* 120 Cal. 244, 248.)

In the second place, assuming that said defect was present, the appellant at all times acquiesced in such error and accepted the same as a fact and took full advantage thereof in accepting the benefits accruing therefrom. In other words, after the execution of the paper to Seaton and the subsequent giving of the offset statement [Deft's Ex. "C", Tr. p. 107], appellant proceeded to take the benefit arising from the sale of said paper to the appellee, Mortgage Corporation. The building contracted for was erected upon the premises of appellant and appellant proceeded to occupy the same and occupies the same to this day. It is fundamental that he who takes the benefit must bear the burden. (*Cal. Civil Code,* Sec. 3521.) And one must not change

his purpose to the injury of another. (*Cal. Civ. Code,* Sec. 3511.)

In fact, under the California law under which the parties acted, appellant is conclusively barred from raising the point here urged.

> *Cal. Code of Civil Procedure,* Sec. 1962: "The following presumptions * * * are deemed conclusive * * * (Subdivision 3): 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; * * *."

Seaton Not a Fictitious Payee.

In opposition to the application for leave to file said amended supplemental complaint appellees filed the affidavit of Theron Walker [Tr. p. 31] and the affidavit of H. E. Seaton [Tr. p. 33], wherein Seaton specifically recalls making the assignment and signing his name upon the paper and said Theron Walker testified to being present at the time. The transaction took place at the office of the said Theron Walker. This specifically controverts the affidavit filed on behalf of appellant. There is no quarrel with the abstract principles of law as stated in the authorities cited (App. Br. pp. 18, 19, 20), but appellant neglects to point out how said authorities can be applicable here. No authorities whatever are cited by appellant which show that the action of the trial court complained of was even error, let alone reversible error in this case.

Re: Enforcement of Unauthorized Charge by Foreclosure of Trust Deed.

It will be noted that although appellant urges error under this head XTr. p. 21], counsel in no wise point out any reason why appellant had a right to interject such new and strange issues into the case. There is no argument that there was any abuse of discretion on the part of the trial judge. No legal rules are cited supporting appellant's position. We beg leave in this connection to call attention to the principles governing upon application for leave to file amended pleadings, and appeals from the rule of the lower court ruling thereon as cited heretofore.

The court will note, of course, that the new matter sought to be pleaded set up entirely new and different issues, as to matters and things happening long after the commencement of this action. Furthermore, what relief would be available to appellant assuming its position to be correct. It is not within the issues of this case to determine the validity of any charges made by the trustee under the terms of the trust deed. If the sale subsequently made—purely a speculative matter—was not made according to the terms of the trust, such attempted sale would be subject to attack in the proper proceedings.

While it is not before the court as a matter of record in this case, except as it is reflected in the allegations of the so-called amended and supplemental bill, there are certain charges consisting of taxes, insurance, *et cetera,* which are by the terms of the deed of trust required to be paid by the trustor, appellant here. If not so paid they can be paid by the appellee beneficiary and

charged as a part of the principal sum due upon the obligation evidenced by the note and trust deed. In the present instance, acting under said provisions of said deed of trust [Tr. p. 96, *et seq.*] appellee has paid out for fire and earthquake insurance upon said premises in excess of $823.97, and has paid for county taxes assessed by the county of Los Angeles in excess of $500. During all of said time the appellant here continued to use and occupy said building and premises without the payment of one dollar by appellant towards its erection. Toward such erection the whole of the purchase price paid by appellee, Mortgage Corporation of America contributed. In other words, appellant has at all times been willing to take money and receive benefits, but has been unwilling in any wise to pay any money whatsoever.

As to Errors Committed at the Hearing.

Appellant urges error (App. Br. p. 23), on the part of the trial court in admitting in evidence three documents, to-wit: the offset statement (Defendant's Exhibit C), the notice of completion (Defendant's Exhibit E), and the stop order read into evidence [Tr. p. 70].

Appellant Has Not Shown Injury Resulting From Alleged Error.

Granting that the trial court erred in the admission of the evidence complained of, there is no attempt on the part of appellant to point out wherein such error substantially affected injuriously any rights of appellant. The rule is well settled that such must be done in order to entitle the complaining party to any relief. We call

the court's attention to the excellent statement of the rule contained in the following cases:

Miller v. Continental Shipbuilding Corp., (*C. C. A. 2nd Cir.*) 265 Fed. 158. Where it was urged that certain evidence was erroneously admitted over the objection of appellant. Rogers, J., stated the true rule applicable, as follows (p. 164):

> "But, even if we were satisfied that the letter was not strictly admissible, we do not think that its admission would constitute so serious an error as to justify a reversal. In Press Pub. Co. v. Monteith, 180 Fed. 356, 362, 103 C. C. A. 502, 508, this court, speaking through Judge Coxe, referred to the rule that, if error is discovered, prejudice must be presumed even if the error be trivial, and pronounced it 'archaic.' It was there said:
>
> 'The more rational and enlightened view is that, in order to justify a reversal, the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.'
>
> "The object of all litigation is to arrive at a just result. That result in our opinion was reached in this case."

Geo. A. Moore & Co. v. Mathiew, (*C. C. A. 9th Cir.*) 13 Fed. (2nd) 747. Where the court states by Rudkin, J., in affirming the action of district judge (749):

> "The opinion of the court below contains a full review of all questions of law and fact involved in the case, and its conclusions are free from error. Its judgment must therefore be affirmed, regardless of any deficiencies or imperfections in the record brought here."

Dimmitt v. Breakey, (*C. C. A. 5th Cir.*) 267 Fed. 792, 794, states the rule:

> "As to the claimed errors in the matter of the admission of evidence, whatever they may have been the rule in the past, the English rule that, where it appears that substantial justice has been done, no reversal will be had on account of the erroneous admission or rejection of evidence, especially where it appears that adding to or subtracting from the evidence in question would not alter the result, now prevails, not only in the appellate courts of the United States, but in many of the states, and it is incumbent upon one who appeals from a judgment, otherwise just, to point out, not merely a technical errancy in the admission or rejection of evidence, but that it is of such a nature that prejudice might reasonably result thereupon."

Re: the "Offset Statement."

We have heretofore referred to the off-set statement showing that the same was received by the appellee, Mortgage Corporation, and had been given and executed by the appellant. It was only after such execution of such instrument on the part of such appellant that any money passed as the consideration for the purchase of said promissory note and trust deed. The witness, Theron Walker [Tr. p. 78] testified that it was given as part consideration prior to the passing of money to him from the appellee, Mortgage Corporation. It clearly was executed as a representation of facts upon which the appellee Mortgage Corporation would act. It was one of the chain facts and circumstances in the transaction. And appellee pleaded it as such [Tr. p. 15],

and was entitled to show upon the trial the facts as to the issues thus presented.

In answer to the contention of appellant that no estoppel was pleaded, we would cite to the record referred to heretofore as evidence of the fact that the facts and circumstances out of which said estoppel arose were pleaded. It is well settled that if the matter constituting an estoppel is apparent on the face of the pleadings, it need not be specially pleaded to be available. (21 *Corpus Juris,* 1245.)

Re: the "Notice of Completion."

In the affirmative answer of defendant, it is alleged [Tr. p. 14], that the consideration for the promissory note and trust deed was to be paid and was paid to Theron Walker progressively while the building was being completed, final payment to be made after notice of completion had been duly filed showing completion of said building. Now, the appellant was interested in getting the building erected. Such is the uncontradicted testimony of the parties. There is nothing to show affirmatively—unless we consider the record in this case as a whole—that it did not, in the first instance at least, intend to pay for the building. It seems that the gentlemen officers in charge of appellant were perfectly willing to have the building erected and completed. It was accepted as completed apparently in accordance with the building contract entered into with Walker, and then there was filed said notice of completion [Tr. p. 108] reciting over the signature of said Clapp the moving spirit in this litigation:

"that said building has been duly constructed in accordance with the plans and specifications and the same

was actually completed on the 31st day of January, 1925."

This was clearly a material fact to be proved in the chain of evidence showing that the allegations of the affirmative defense of appellees were true. In either event, the most that can be said about the notice of completion was that it was an immaterial matter let into the record. It could not have in any wise moved the trial court as to any crucial point in the chain. It was not such an instrument or document which in and of itself would unduly prejudice the trial court.

Re: the "Stop Order."

It is complained (App. Br. p. 26) that this was erroneously admitted in evidence upon the grounds that it was incompetent and immaterial. The argument last urged with reference to the notice of completion is also applicable here. As heretofore related the officer of the trustee disbursing the funds payable out of the "improvement fund" never had any money payable or which could have been payable to the appellee, Mortgage Corporation, on account of the assignment. While it appears that said trustee did obey the stop order in that it recognized said lack as a party in interest to the trust, he being the person over whom the Mortgage Corporation had no control, such action on the part of the trustee bank would not in any wise have influenced the court in deciding that the particular instrument in question here, namely: the assignment, was taken and made as payment *pro tanto* upon the $12,500 promissory note. On the contrary, it would indicate just the opposite. Clearly, no prejudice

whatever could have resulted from the action of the trial court. On the other hand, it would appear this being one of the facts and circumstances surrounding the whole transaction that it was material in order to allow the court the benefit of a full showing of such facts. There is no merit whatever in the point urged.

Re: "Other Errors."

Under this head, appellant states (App. Br. p. 26):

"The trial of the cause centered about the nature and purpose of, and effect to be given to, the assignment by the complainant to Theron Walker Engineering & Construction Company of the *debt* of $11,965 * * *. The complainant (appellant here) contended that the assignment was an absolute transfer of the account in partial payment of complainant's notes held by Walker, and the defendants contended that it was mere collateral security for those notes. The District Court agreed with the defendants' contention and considered that the settlement of that question settled the case. We urge that the court was in error in both respects."

Appellant then makes the anomalous statement (App. Br. p. 28):

"If the assignment was not as mere security for the notes, the decree of the court is erroneous; and if it was mere security still the decree is erroneous."

There is then cited by counsel some elementary rules of interpretation of contracts which are excellent rules. Their application in the instant case, together with the language of the written instruments passing between the parties, undoubtedly was the basis of the trial court's findings and decree in this case. We have heretofore, under the head "Evidence Conclusive that Assignment

of $11,965 Item Was Not as Payment" set forth the evidence amply supporting such finding. Appellant does not attempt to look to the evidence in support of its contention and does not attempt to point out any portion of the record substantiating in any wise its claim. There is only an attempted strained construction of a small part of one exhibit made by appellant in support of its argument (App. Br., p. 30, *et seq.*)

Appellant argues (App. Br., p. 34) that the decree was erroneous even if the assignment was as collateral and proceeds to recite that complainant was entitled to an accounting even if the assignment was not received as payment *pro tanto*. With apparent sincerity, appellant states: "Before resorting to a sale of complainant's land, defendants should have been compelled to exhaust the collateral, personal security and reduce the amount due upon the note as much as possible."

There follows no citation of authority whatever but on the contrary a bald resort to moral sentiment. Perhaps, appellant preferred to rely upon such as authority for its appeal here for the reason that the legal principle governing is to the contrary.

> *Jones on Collateral Securities*, Third Ed. p. 715, Sec. 593:
>
> "The return of the pledge is not a condition to be performed before or concurrently with the payment of the debt secured. * * * Even an agreement that upon a partial payment of the debt a proportionate part of certain shares pledged to secure it shall be given up, is construed to mean that the shares not to be returned after the money is paid. The creditor may bring suit upon the debt

without first returning the shares; though of course if he should not return the shares after payment of the debt or after judgment recovered upon it, trover would lie against him for their value."

11 *Corp. Juris,* 961:

"COLLATERAL SECURITY. Any property or right of action, as a bill of sale or stock certificate, which is given to secure the performance of a contract or the discharge of an obligation *and as additional to the obligation of that contract,* and which upon the performance of the latter is to be surrendered or discharged, a separate obligation attached to another contract to guarantee its payment. * * * The collateral security stands by the side of the principal promise as an additional or cumulative means for securing payment of debt."

Conclusion.

Under the head "Conclusion" (App. Br. 34), appellant apparently abandons all hope based on any legal right or equity principles cognizant. Its counsel proceeds to state some facts and a number of assumptions and concedes the error of appellant's ways throughout this whole transaction, and that if the appellees are not paid the money due under the trust deed note, appellees will proceed to foreclose as per the contract between the parties. There is then a pure appeal to maudlin sentiment in the closing words, "From such a predicament and calamity surely this court will save us."

In connection with the appeal for mercy and charity, so to speak, to be directed in some wise or other by this court, we beg leave to call attention to several very important facts:

First: Appellant has been willing to do everything in connection with this litigation and the trust deed and note, except to pay any money on account thereof;

Second: Appellant, as heretofore stated, has since long prior to the commencement of this litigation (original bill was filed November 27, 1925), continued to occupy and make use of the premises, the subject matter of the litigation;

Third: Appellant has paid no taxes assessed against the property and no insurance premiums upon the building erected, the same having been paid at all times by the appellee, Mortgage Corporation;

Fourth: That the appellee, Mortgage Corporation, has received no money to reimburse itself for any of the considerable charges and obligations incurred in connection with preserving its rights in connection with this property, except $750.00 paid as interest on the $12,500 note as heretofore set forth.

Therefore, the plea and prayer of appellant comes with very poor grace. We humbly urge that no error is shown upon this appeal and that the judgment of the trial court should be affirmed.

Respectfully submitted,

SAMUEL C. COHN,
CLORE WARNE,
Solicitors for Appellees.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

Paramount Motors Corporation of the Pacific, a corporation,
Complainant,
vs
Title Guarantee & Trust Company, a corporation; the Mortgage Corporation of America, a corporation and Theron Walker, styling himself and doing business as Theron Walker Engineering & Construction Company,
Defendants.

IN EQUITY.

AMENDED BILL OF COMPLAINT.

To The Honorable, the Judges of said Court:

Humbly complaining, comes now your orator, Paramount Motors Corporation of the Pacific, by leave of court first given, and exhibits this, its Amended Bill of Complaint against the Mortgage Corporation of America, Title Guarantee & Trust Company and Theron Walker, defendants, and for cause of complaint respectfully shows unto Your Honors.

I.

That your orator is a corporation created and organized under the laws of the State of Delaware and is a citizen of that state; that the Title Guarantee & Trust Company and the Mortgage Corporation of America are corporations created under the laws of the State of California, and are citizens of that state and are doing business in said Southern District thereof; that said Theron Walker is a citizen of the State of California and an inhabitant of said Southern District; that this cause is a suit of a civil nature, in equity, wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interests and costs.

II

That your orator was created and organized for the purpose of acquiring, owning, holding and selling real estate and engaging in manufacture and for other like purposes, and prior to November, 1924, had acquired an interest in a certain tract of land situate at Azusa, in Los Angeles County in said Southern District of California, which had been subdivided and was being sold out in lots on sales contracts and on time payments under the designation, Subdivision No. 8507, also known as Paramount Heights Subdivision, to which subdivision your orator had advanced and loaned the sum of $11,965.00, which was to be repaid to your orator under a trust arrangement being conducted through the Bank of America, in the City of Los Angeles, out of the proceeds of the sale of lots in said tract; and had also acquired and owned another tract of land at said Azusa, known and described as follows:

A 20.00 acre parcel east and west center line of which is Paramount Street; a portion of Lots 11 and 12 Subdivision No. 4, Azusa Land & Water Company, as recorded in Book 43 at Page 94, Miscellaneous Records of Los Angeles County, California, and more particularly described as follows:

Beginning at a point in the westerly line of Motor Avenue as shown on map of Tract 8507, as recorded in Book 102, Pages 78 and 79 of maps of said county; said point bears S. 0° 12′ 2″ W. 815.36 feet from the northwest corner of said Tract No. 8507; thence from the true point of beginning, S. 0° 12′ 2″ W. along the westerly line of said Motor Avenue a distance of 921.00 feet to a point; thence N. 89° 47′ 58″ W. a distance of 945.00 feet to a point; thence N. 0° 12′ 2″ E. a distance of 921.00 feet to a point; thence S. 89° 47′ 58″ E. a distance of 945 feet to the point of beginning, containing 20 acres Los Angeles County, California.

III

That your orator, desiring to construct upon the tract of land last mentioned, a building for its manufacturing purposes, entered into negotiations therefor with the defendant, Theron Walker, who prepared plans and specifications for such a building as your orator required, and estimated the cost thereof at $17,000.00, and afterwards and on or about the 28th day of November, 1924, your orator entered into a contract with said Walker, under the designation, Theron Walker Engineering & Construction Company, for the furnishing of the materials and labor for the construction of such building.

IV

That prior to the making of said contract said Walker had represented to your orator that one H. E. Seaton would provide the money for financing said building, taking the notes of your orator for said $17,000.00, and accordingly your orator at the instance of said Walker executed to said Seaton its first note dated December 1st, 1924, for the sum of $12,500.00 payable "in installments of Eight Hundred ($800.00) or more Dollars" on the first of each month beginning Aug. 1st, 1925, and continuing until Dec. 1st, 1925, when the residue should be paid, and to secure payment thereof executed a deed of trust of even date to the defendant, Title Guarantee & Trust Company, trustee, for the benefit of said Seaton, which deed of trust was afterwards recorded in the Office of the County Recorder of said Los Angeles County in Book 3501 at page 373, of Official Records of said County; and at or about the same time executed to said Seaton, by direction of said Walker, a note for the sum of $4,500.00, payable in installments, and to secure the payment thereof executed to said Title Guarantee & Trust Company, trustee for the benefit of said Seaton, a second deed of trust upon said twenty acre tract of land.

V

That the said Seaton, notwithstanding the execution of said notes and deeds of trust to him as aforesaid, failed to pay your orator any money or other thing therefor, or to produce any money for the financing of said building project, either to your orator or to said Walker, and on the 4th day of December, 1924, assigned the said notes and deeds of trust to said "Theron Wal-

ker Engineering & Construction Company, without recourse. Your orator is now informed by the said Walker, and therefore avers, that said Seaton was "the nominee and agent" of said Walker in said note and trust deed transaction, and not an independent actor.

VI

That thereupon, the said notes having come into the hands of said Walker, your orator executed and delivered to said Walker an instrument of writing assigning and transferring to him, therein designated as "Theron Walker Engineering & Construction Company," the said claim and demand of $11,965.00 against said Paramount Heights Subdivision, as payment pro tanto upon said notes so held by him as aforesaid, and said assignment and claims were so accepted by said Walker, and your orator caused notice of said assignment of said claim and demand to be given to the Bank of America, which was receiving and disbursing the proceeds of said lot sales under a trust designated as "Bank of America Trust No. 243," and caused written instructions and directions to be given said Bank to pay to said Theron Walker Engineering & Construction Company, as assignee of your orator, forty per cent of the funds coming into said trust, up to the said sum of $11,965.00, payments to be made on the first of each month as said Walker should direct, beginning February 1st, 1925. And the said Walker filed said assignment with said Bank of America, and ever since said assignment was made all payments on said account have been made to said Walker or his assigns or as he or they have directed, and no payments thereon have been made to your orator since your orator's assignment of said demand.

At the time of the said assignment the sales of lots in said Subdivision amounted to approximately $38,-000.00, forty per cent of which amount, up to the sum of $11,965.00, was payable to your orator upon its loan or advancement to said Subdivision enterprise, as receipts from sales should come into said fund, and they were then coming in to the credit of your orator at the rate of between $400.00 and $500.00 per month, with reasonable expectations that they would rapidly increase to $800.00 or more per month.

VII

That afterwards and on or about December 18th, 1924, the defendant Walker, using the name, Theron Walker Engineering & Construction Company, assigned and transferred said $12,500.00 note and his rights under the deed of trust securing the same to the defendant, Mortgage Corporation of America, and also assigned to said defendant Corporation the aforesaid claim and demand of $11,965.00 upon said subdivision trust fund.

VIII

That in addition to the payment of the said sum of $11,965.00 to said Walker, as aforesaid, your orator paid to the defendant, Mortgage Corporation of America, the sum of $750.00, being three payments of $250.00 each, on quarterly interests claimed by said defendant to be due and in arrears.

IX

That the said Seaton paid no money or other consideration to your orator on account of the execution of said notes to him by your orator, and your orator received no consideration therefor except the said Walker building contract and the work done thereunder, and said Walker paid no consideration to said Seaton for

the assignment of said notes to him, the said Walker, and your orator avers, upon information and belief, that the defendant Mortgage Corporation of America paid the said Walker no money for said notes and claims but took the assignments thereof from said Walker upon some agreement to pay the construction bills accruing upon your orator's said factory building from time to time as the work thereon should progress, to limited amount, but what amount has been paid on that account your orator is not informed.

X

That at the time of the transfer of said $11,965.00 account to said Walker by your orator, in payment upon said two notes of $12,500.00 and $4,500.00 respectively as aforesaid, your orator gave no direction to the said Walker as to the particular distribution and application of said payment between said two notes, both of which were then held and owned by him, but your orator is informed and assumes the fact to be that part of said payment has been applied to and has extinguished said $4,500.00 note, leaving approximately $7,465.00 to be applied on the $12,500.00; but however said payment was or could have been distributed, not more than about $5,000.00 of the principal and a small amount of interest is or can be now owing on said $12,500.00 note.

XI.

That notwithstanding the premises and the small indebtedness of your orator upon said note now held by the defendant, Mortgage Corporation of America, said defendant is claiming and demanding of your orator the full sum of $12,500.00, together with certain interest thereon, and has made demand upon the defendant, Title

Guarantee & Trust Company, to proceed to foreclose said deed of trust held by defendant, Mortgage Corporation of America, for alleged default in payment of said note or the interest thereon, and said Trustee has filed in the Office of the County Recorder of said Los Angeles County a so-called notice of default, and the said defendants are preparing and threatening to sell, and, unless restrained by this court will proceed and sell all said twenty acre tract of land and premises and improvements, to the great, immediate and irreparable damage of your orator.

XII

That by reason of the premises and the unjust demands of the defendants and the public declaration that your orator is in default in its financial obligations, your orator has been and still is seriously damaged and embarrassed in its credit and in its ownership, use and enjoyment of said land and in its financial operations concerning the same, to such an extent that its plans for finishing and equipping its factory building on said land, for which purposes said notes and deed of trust were given, have been suspended and your orator is unable to proceed with its business.

XIII

That the reasonable market value of the said land and property so threatened with sale as aforesaid is not less than $55,000.00.

XIV

That your orator is able, willing and ready to pay whatever your orator may justly owe on said note when the same shall become due and the amount of such indebtedness shall be ascertained, and your orator now

offers to make such payment; but your orator denies that it is indebted to the defendants, or any of them, in any sum approaching the amount now claimed by them to be owing upon said note and for refusal to pay which said foreclosure sale is threatened.

XV

That your orator has no means of preventing said threatened foreclosure and sale and the great sacrifice of its property, except to submit to the unjust, unlawful and extortionate demands of the defendants and pay the same, and no plain, speedy and adequate remedy at common law to prevent or redress the wrongs herein complained of, or any remedy except such as a court of equity can afford your orator.

Wherefore your orator, being elsewhere remediless, comes into Your Honors' Court of Chancery, where such causes and grievances as your orator's are cognizable and relievable and humbly

Prays:

That this, your orator's Amended Bill of Complaint, be received and filed herein, that said Title Guarantee & Trust Company, Mortgage Corporation of America, and Theron Walker, doing business as Theron Walker Engineering & Construction Company, be made defendants hereto and be required to answer the allegations hereof, and that process of subpoena to that end issue against said Walker.

That the Court ascertain and determine the amount still owing from your orator upon the said $12,500.00 note, after crediting upon said note the said sum of $750.00, paid thereon as aforesaid, and all of said $11,965.00 not justly applied and credited upon said $4,500.00 note or justly applicable upon the same.

That pending the hearing of this cause, or until the further order of the Court herein, the defendants, the Mortgage Corporation of America and Title Guarantee & Trust Company, their officers, agents, servants and all persons acting for or under them or either of them, be forthwith inhibited, restrained and enjoined from selling or offering to sell the real estate and property hereinbefore mentioned and described, or any part thereof, in or under the said default notice or otherwise, and from taking any steps or action whatsoever towards a foreclosure of the deed of trust hereinbefore mentioned, and that upon payment of any sum that may be found lawfully due from your orator, if any, the said defendants be perpetually enjoined from such foreclosure proceedings, and be required, adjudged and decreed to surrender to your orator the note aforesaid and to release and discharge of record the said deed of trust.

That your orator have judgment against the defendants for your orator's costs in this behalf expended, including reasonable counsel fees, and that your orator may have all other and further proper process and orders, and all further, fuller and general relief proper in the premises and as the nature of its case may require or admit of, And your orator, as in duty bound, will ever pray etc.

Paramount Motors Corporation of the Pacific
By its Counsel

Caesar A. Roberts
Maynard F. Stiles
Solicitors for Complainant.

State of California, County of Los Angeles ss

R E Clapp being duly sworn says on oath that he is the managing director of the Complainant corporation; that he has read the foregoing amended Bill of Complaint and knows the contents of the same: that the matters and things therein averred are true to the best of the affiants knowledge and belief and that he makes this verification as an officer on behalf of the corporation complainant.

R. E. Clapp

Sworn and subscribed before me this 13th day of February 1926

[Seal] Dolly H. Pritchard

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. J 85 H In the United States District Court Southern District of California Southern Division Paramount Motors of the Pacific Corporation etc Complainant vs Title Guarantee & Trust Co. Defendant Amended Bill of Complaint Filed Feb 13 1926 Chas. N. Williams, clerk by L. J. Cordes deputy clerk Maynard F. Stiles, Caesar A. Roberts, 407 Law Building Solicitors for Complainant

No. 3862

In the

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST MOTORS CORPORATION OF THE PACIFIC,
a corporation,
Appellant and Petitioner,

vs.

TITLE GUARANTEE & TRUST CO.,
a corporation,
THE MORTGAGE CORPORATION OF AMERICA, a corporation, and PURDON WALREE, sued herein as PURDON WALREE ENGINEERING & CONSTRUCTION COMPANY,
Appellees and Respondents.

PETITION OF APPELLANT FOR REHEARING.

CARROLL A. ROBERTS,
MAYNARD P. STILES,
402 Law Building,
139 North Broadway
Los Angeles, California,
Attorneys for Appellant and Petitioner.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC,
a corporation,
Appellant and Petitioner.

vs.

TITLE GUARANTEE & TRUST CO.,
a corporation;
THE MORTGAGE CORPORATION OF AMERICA, a corporation, and
THERON WALKER, styling himself and doing business as THERON WALKER ENGINEERING & CONSTRUCTION COMPANY,
Appellees and Respondents.

PETITION OF APPELLANT FOR REHEARING.

To the Honorable Judges of said Court:

The appellant above named, feeling aggrieved by the decision and opinion of this honorable court, affirming the decree of the court below, respectfully petitions your Honors to grant your petitioner a rehearing and reconsideration of said cause; for these reasons:

I. The court appears to have overlooked or to have attached insufficient importance to certain facts connected

with the transaction concerning the $11,965.00 account, assigned by the complainant to Theron Walker, and by him assigned to defendant, Mortgage Corporation of America, resulting, as your petitioner respectfully urges, in an erroneous affirmance of the finding of the district court that the assignment was only as security for the notes that were already secured by trust deeds, and not as payment thereon.

II. Walker, having accepted the assignment, whether as payment or as security, and his assignee having collected and applied for his benefit a large portion of the money assigned, equity would seem to require that some accounting should be had of the residue, there still being cash on hand in the fund, before a sale of the land should be permitted to enforce payment of a sum *in excess of the total original demand.*

III. The complainant prayed an accounting to determine the state of the indebtedness and offered to pay whatever sum should be found justly owing. After the filing of the amended bill but before the hearing, the defendants began pyramiding arbitrary demands against complainant, which were brought to the court's attention at the trial but ignored by the court as not in issue. An accounting of what was justly due and for which a sale of the land was permissible would have considered and would have excluded the $2,579.43 item, added after the first dismissal of the bill herein, and would have prevented the making of the subsequent like additions; but if this matter was not deemed to be within the purview of the pleadings, the court should have entertained the amended and supplemental bill, complaining of this addi-

tional demand, as an effort to resist the enforcement of an extortionate exaction, not as an "attempt to delay the collection of a just debt."

IV. When this court restrained foreclosure proceedings on the trust deed, pending appeal, it required the appellant to give a bond with the condition that, upon affirmance of the decree appealed from, appellant would pay to the appellees $2,500.00, to be "applied on the indebtedness of appellant to appellee, Mortgage Corporation of America." The affirmance of the decree now makes that payment obligatory, but insures no relief to appellant; for the amount of the indebtedness is not ascertained, and no provision is anywhere made for fixing it, or preventing appellees from arbitrarily augmenting their former demands, as they have heretofore done.

WHEREFORE, your petitioner respectfully prays that a rehearing of this cause be had and that the decree appealed from be re-examined and reversed.

PARAMOUNT MOTORS CORPORATION
OF THE PACIFIC,

By Counsel.

CAESAR A. ROBERTS,
MAYNARD F. STILES,
Solicitors.

We, the undersigned counsel of record for the above named petitioner, hereby certify that in our opinion the foregoing petition for a rehearing of the above entitled

cause is well founded and that the petition is not interposed for purposes of delay.

CAESAR A. ROBERTS,
MAYNARD F. STILES.

ARGUMENT IN SUPPORT OF PETITION.

In asking a rehearing, counsel are embarrassed by the consciousness that they may not have given the court all the help they might have given.

The court below dismissed complainant's bill on motion for want of equity on its face, and in reversing that dismissal this court said (15 Fed. (2nd) 299):

"A threat is made by a trustee to sell property to satisfy a claim of $12,500.00 and interest, the greater part of which has already been paid, and no question of bona fide purchaser is involved. That a court of equity will enjoin such a sale and such a breech of trust on the part of the trustee does not admit of question. *Wilksie on Mortgage Foreclosure,* Sec. 3945."

When the cause came back to the district court for trial, that court held that an assignment of a recognized demand for $11,965.00 upon a fund created for the purpose of improving Paramount Heights, which complainant contended was payment on account of the $12,500.00 note and $4,500.00 note, was "as collateral only and not as payment." With that finding this court agrees.

The paper appearing in evidence as the assignment in question bears date November 29, 1924, while the notes in question are dated December 1, 1924, and this court holds that it is absurd to contend "that the assignment was executed and accepted as part payment on a note

not then in existence." But is it *less absurd* for the district court to hold that the assignment was executed and accepted *as security* for a note *not then in existence?*

The assignment obviously is misdated, for the resolution relied upon by the defendants as authorizing it was adopted at a meeting "held at 4:00 P. M., December 3, 1924." (R 136.) The assignment may have been prepared on the day of its date, the day following the date of the building contract, but doubtless was not delivered until later. What Walker and the Mortgage Corporation regarded and treated as the assignment of the account, and what Walker assigned to the Mortgage Corporation is dated December 4, 1924 (R 130) and is a direction of the beneficiary of Trust No. 243 to the Bank of America, holding the fund, to pay Walker up to $11,-965.00. That was the effective paper.

What did Walker consider his interest in or his rights under the assignment and the account and *what character did he impress upon it?* He certainly accepted the assignment *as payment* to the extent at least of $4500.00 or more, for that sum was collected and *applied to the payment* of the $4500.00 note. So far it seems to have been *payment* and not mere *collateral security.* He might properly have applied the money upon the other note, and he intended the residue to be applied upon it. The assignment of this account to Roper (R 131) and the assignment to the Mortgage Corporation (R 130) are companion pieces.

There was no forclosure upon this account *as collateral;* the money was collected and paid *without waiting for default* on the note. The account was not *sold for default.*

Walker treated the assignment as *payment* on the $4500.00 note and this he did with the *consent of the Mortgage Company,* for the latter took the account subject to that application of $4500.00. How can they consistently contend now that it was *mere collateral* as to the *other note?* Complainant made no distinction—it was to apply on the $17,000.00. Was not the character of the assignment fixed for all purposes when it was applied as payment on the $4500.00 note, if not before?

Counsel for appellant in their brief give this correct definition of collateral security, from 11 *Corp. Juris,* 961:

"*Collateral Security*—Any property or right of action, as a bill of sale or stock certificate, which is given to secure the performance of a contract or the discharge of an obligation and as additional to the obligation of that contract, and which upon the performance of the latter *is to be surrendered* or discharged, a separate obligation attached to another contract to guarantee its payment * * *."

That Walker did not regard the assignment in question nor the account assigned as mere collateral is manifest from the fact that he immediately proceeded to use the fund *as payment,* and put it out of his power, upon the performance of the main obligation or otherwise or at any time, *to surrender* the assigned account. If it was collateral, then the assignor was entitled to have it surrendered, undiminished in value or amount by any act of the assignee, upon payment of the debt secured; or upon default of such payment, to have it sold and applied on the debt. Walker made either course impossible.

But whether the account be treated as payment or as security, some accounting should have been had, for it appears that at the time of the assignment to Walker, $1855.56 had been paid into the fund, and that up to March 14, 1927, $13,615.95 more came into the fund (R. 70-71) and this appears to have been subject to the assignment in question and under control of the defendants and out of control of the complainant. Doubtless the district court would have directed some accounting, if the assignment had not been regarded as purley collateral.

* * * *

When the amended bill was filed and when it was dismissed on motion, the amount for which the defendants threatened the sale of the land was about $13,000.00, but immediately upon dismissal $2,000.00 or more was added. As the bill prayed an accounting to ascertain what sum complainant justly owed, proffering to pay the same when ascertained, it was thought that such an accounting would be had and that the added claim, if made, would be disallowed or at least passed upon. As soon, however, as the court treated the claim as not before the court, complainant prepared the supplemental bill, which presented the matter, and submitted it to the court as soon as the presence and convenience of the judge permitted and at the time the main cause was submitted, and without intentional delay.

Upon the entering of the final decree the defendants advanced their demands another $4,000.00 and more.

* * * *

Upon restraining the sale pending the present appeal, this court exacted of the appellant, not an ordinary

injunction bond to answer damages, but a bond conditioned for the absolute payment of $2500.00 to the defendants on account of the debt, in event the decree appealed from should be affirmed. The affirmance of the decree puts that burden upon appellant and still leaves the defendants unrestrained and at liberty, so far as this court or the court below is concerned, to add to their previous demands further demands at their pleasure. It is left to their arbitrary will to say what is justly due, and what sum must be paid to prevent the sale.

It is respectfully submitted that the existing situation calls for some relief, which can only be had through a rehearing of the cause, and that for the reasons stated such rehearing should be awarded.

Respectfully submitted,

CAESAR A. ROBERTS,
MAYNARD F. STILES,
For Petitioner.

No. 5282

United States

Circuit Court of Appeals

For the Ninth Circuit.

14

W. E. DEAN, as Trustee in Bankruptcy of the Estate of ROBERT E. SHEPHARD, a Bankrupt,

Appellant,

vs.

ROBERT E. SHEPHARD,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5282

United States

Circuit Court of Appeals

For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Trustee and Appellant:

LAURENCE R. CHILCOTE, Esq., Builders Exchange Bldg., Oakland, California.

For Bankrupt and Appellee:

W. E. RODE, Esq., Oakland Bank Bldg., Oakland, California.

In the Southern Division of the United States District Court, for the Northern District of California.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 15,789.

In the Matter of ROBERT E. SHEPHARD, Bankrupt.

W. E. DEAN, Trustee in Bankruptcy of the Estate of ROBERT E. SHEPHARD, a Bankrupt,
Appellant,

vs.

ROBERT E. SHEPHARD, Bankrupt,
Appellee.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Southern Division of the United States District Court for the Northern District of California:

You will please prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following papers and records, as the record on appeal desired by the appellant.

1. Referee's order, dated June 9, 1927, on exemptions.
2. Bankrupt's petition for review of said order.
3. Agreed statement of facts.
4. Opinion of Referee on question of exemptions claimed by bankrupt.
5. Memo opinion and orders *re* review, dated August 29, 1927, of the Honorable United States Judge Bourquin.

LAURENCE R. CHILCOTE,
Attorney for Appellant. [1*]

Receipt of copy of the within praecipe for transcript of record and receipt of a copy thereof admitted this 27th day of September, 1927.

W. E. RODE,
Attorney for Appellee.

[Endorsed]: Filed Sep. 27, 1927, at 4 o'clock P. M. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

ORDER ALLOWING CERTAIN PROPERTY AS EXEMPT AND DIRECTING BANKRUPT TO TURN OVER TO TRUSTEE OTHER PROPERTY CLAIMED AS EXEMPT.

W. E. Dean, Trustee in Bankruptcy herein, having filed his report of exempt property on May 10th, 1927; and, having filed on May 11th, 1927, his verified petition praying for an order to show cause to be issued herein, directed against said bankrupt, requiring him to show cause before this court at a time and place certain why an order should not be made and entered directing said bankrupt to turn over and deliver, certain property now in his possession and which he claims to be exempt, to the trustee herein to be administered as part of the above estate; and said order having been issued as prayed; and, the matter having been heard at the time and place specified, and at other hearings to which the matter was regularly continued; and, having considered the testimony taken herein, the record, the briefs submitted by respective counsel for the trustee and the bankrupt, and due deliberation having been had, it is hereby

ORDERED, ADJUDGED AND DECREED, that said trustee's report of exempt property be, and the same hereby is, in all things confirmed, and the bankrupt's claim to exemption is hereby determined accordingly respecting the property more

particularly described in paragraphs 2 and 3 found on page 5 of bankrupt's schedule B, to wit:

Paragraph 2, bankrupt's schedule B (5),
1 desk and chair, necessary household table and kitchen furniture, including one sewing machine, stove and furniture, wearing apparel, beds and bedding, and one piano $250.00

Paragraph 3, bankrupt's schedule B (5),
The tools and implements of petitioner necessary to carry on his trade as an auto body mechanic consisting of anvil, forge and miscellaneous hand tools, electric drill, sewing-machine, acetylene welding outfit $125.00

[3]

and that said property be set apart to said bankrupt as exempt from the operation of the Acts of Congress relating to bankruptcy.

And it is FURTHER ORDERED, ADJUDGED AND DECREED that the bankrupt turn over and deliver to the trustee herein, forthwith, the property referred to in paragraph 5 found on page 5 of bankrupt's schedule B, to wit:

Paragraph 5, bankrupt's schedule B (5),
1 band saw, power and motor, post drill and motor and emery stand, being the property referred to in schedule A (2).... $400.00

said property being more particularly described as follows, to wit:

1–36-inch band saw (power driven),
1–12-inch joiner (power driven),

1–½-inch post drill (power driven),

1–emery-wheel (power driven),

together with the electric motors and power transmission equipment, to wit:

1–2-horsepower motor,

1–5-horsepower motor,

1–countershaft, with 4 pulleys and 2 hangers,

1–3½-inch belt,

1–4-inch belt,

2–Wells Norris motor starting switches.

said property having been heretofore claimed by the bankrupt as exempt, but which the trustee herein is hereby authorized and directed to assume control of for the benefit of the estate of the bankrupt herein.

Dated: June 9, 1927.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 10, 1927, at 4:45 o'clock P. M. [4]

[Title of Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER.

Comes now Robert E. Shephard, bankrupt above named, and alleges that petitioner was a party to the following certain proceedings in said bankruptcy pending before Burton J. Wyman, Esq., as the Referee in Bankruptcy in charge thereof, to wit:

On the hearing of order directing said defendant to show cause why he should not be required to turn over to W. E. Dean, as trustee in said matter, certain tools and equipment to be administered in the above-entitled proceeding for the benefit of said estate; at the conclusion of said hearing, to wit, on June 9, 1927, an order was made that said trustee's report of exempt property be confirmed and that bankrupt turn over and deliver to said trustee forthwith the following described tools and implements: 1–36-inch band saw, 1–12-inch joiner, 1–½-inch post drill, 1 emery-wheel, together with 1–2-HP. motor, 1–5-HP. motor, and the following transmission equipment; 1 countershaft, with 4 pulleys and 2 hangers, 1–3½-inch belt, 1–4-inch belt and 2–Wells Norris motor starting switches.

That said order further directed said trustee to assume control of said tools and implements for the benefit of the estate of said bankrupt and to which order petitioner duly excepted.

Said order is erroneous in this: That said property directed to be turned over by said bankrupt to said trustee was and is claimed by said bankrupt as exempt and the same constitute tools and implements of said bankrupt necessary to carry on his his trade, to wit: that of automobile body mechanic, and the same are therefore exempt under the provisions of subdivision 4 of section 690 of the Code of Civil [5] Procedure of the State of California and under the Acts of Congress relating to bankruptcy and said tools and implements should

therefore have been set apart to said bankrupt as exempt.

WHEREFORE petitioner prays that said order be reviewed and that the same be modified in that said tools and implements so directed to be delivered and turned over to the trustee herein be declared exempt and that said trustee be declared to have no interest therein and the petitioner be restored to all things that he has lost by reason of said error.

ROBERT E. SHEPHARD,
Petitioner on Review.
W. E. RODE,
Attorney for Petitioner. [6]

State of California,
County of Alameda,—ss.

Robert E. Shephard, being duly sworn, says: That he is the petitioner named in the above-entitled matter; that he has read the foregoing petition for review and knows the contents thereof; that same is true of his own knowledge except as to matters therein stated on information and belief, and as to such matters that he believes it to be true.

ROBERT E. SHEPHARD.

Subscribed and sworn to before me this 16th day of June, 1927.

[Seal] W. E. RODE,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed June 16, 1927, at 1:15 P. M. [7]

[Title of Court and Cause.]

AGREED STATEMENT OF FACTS SUBMITTED ON HEARING OF ORDER TO SHOW CAUSE WHY BANKRUPT SHOULD NOT TURN OVER CERTAIN PROPERTY CLAIMED AS EXEMPT TO THE TRUSTEE.

It is hereby stipulated and agreed that the following was the testimony produced on the hearing of the order directing said defendant to show cause originally set for hearing for May 11, 1927, and continued from time to time regularly to June 9, 1927, why he should not be required to turn over to W. E. Dean, as trustee in bankruptcy, the tools and equipment below referred to, to be administered in the above-entitled proceedings for the benefit of the above-entitled estate, to wit:

That the bankrupt was and is an auto body mechanic and had followed that trade exclusively and continuously for more than fifteen years last past and up to the present time; that at the time of filing his petition in bankruptcy he was engaged in carrying on his said trade at 4166 Broadway, Oakland, working for himself and having his own place of business, and at that time and for some four months previously was carrying on his trade by himself and alone and had no other mechanics or men working for him; that previously at various times he had an average of two or three auto body mechanics in his employ but that he never at any

time had more than four such mechanics working for him.

That at the time of filing his petition in bankruptcy the bankrupt was using in his said trade and claimed as exempt the following tools and implements, to wit: [8]

1–12″ joiner with 2-HP. direct drive motor attached.

1–36″ band saw connected up with ½″ post drill and an emery-wheel and driven by a 5-HP. motor;

and the following transmission equipment:

1 countershaft with 4 pulleys and 2 hangers, 1–3½″ belt, 1–4″ belt, 1–2″ belt, 2 Wells-Norris motor starting switches.

That a journeyman auto body mechanic when working for another is not required to furnish such band saw, joiner, drill or emery-wheel but the same are usually furnished by the establishment for which he works; that the bankrupt could not and cannot carry on his trade as an auto body mechanic under present-day conditions without the use of said implements driven by electric motors; that the peculiar nature of auto body work, that is, repairing and rebuilding auto bodies requires the use of said power driven implements because woodwork in auto bodies is hardwood and generally is fitted in curving lines conforming with the outward lines or appearance of an auto body and for those reasons it is practically impossible to cut same out and finish same with an ordinary hand saw or hand tools and that to undertake to do so would render

the labor so costly that a mechanic could not successfully carry on his trade; that such band saw, joiner, drill and emery-wheel with said motors to drive same are part of the ordinary equipment of an auto body mechanic who carries on his trade as such and is the minimum equipment with which an auto body mechanic can successfully carry on his trade; that without said equipment an auto body mechanic cannot carry on that trade for himself.

That the bankrupt was not at the time of the filing of his petition in bankruptcy and at no time has been a manufacturer of auto bodies but that his work as auto body mechanic has been confined to the rebuilding and repairing of auto and commercial bodies and the occasional making of commercial bodies for trucks or delivery autos on special orders and specifications for each job, as a jobbing shop; and that the bankrupt has never produced the same except on special orders. [9]

Testimony of both the bankrupt and Expert Sours, produced on behalf of the bankrupt, was that an auto body mechanic was not expected to furnish said equipment when working as an employee or journeyman at his trade. Expert Sours testified that although he has been employed as an auto body mechanic for a long time, admitted that he had never owned or supplied said equipment. Both witnesses testified that said property was power driven.

Both the bankrupt and his expert, Mr. Sours, testified on direct examination that said power

machinery or equipment was necessary. On cross-examination Mr. Sours testified that he had been employed by the bankrupt for a long time as an auto body mechanic; that he was familiar with the work done by the bankrupt; that the month of August, 1926, was the best month they ever had. He was read the job record for the month of August, 1926, and was unable to pick out a job which required the use of the same as necessary to complete said job. The job record showed the jobs performed during the months of June, July and August, 1926, their best months, as being repairing side curtains, putting in new celluloids, repairing fenders, straightening fenders, etc., jobs which Mr. Sours admitted did not require the use of the same. The bankrupt testified on cross-examination: When given the job record, and asked to pick out a job performed during July or August, 1926, and which required the use of the same to complete, he was unable to find one. He found one job in June, 1926, that of *building* a Type B Survey Body for the U. S. Department of Agriculture, which he said required the use of the same.

LAURENCE R. CHILCOTE,
Attorney for Said Trustee.
W. E. RODE,
Attorney for Said Bankrupt.

[Endorsed]: Filed June 16, 1927, at 1:15 P. M.
[10]

[Title of Court and Cause.]

OPINION OF REFEREE ON QUESTION OF EXEMPTIONS CLAIMED BY BANKRUPT.

The bankrupt herein is an automobile top maker. Because he claims them as the tools or implements of his trade, he asks that the following described personal property be set aside as exempt:

1–36-inch band saw (power driven),
1–12-inch joiner (power driven),
1–½-inch post drill (power driven),
1–emery-wheel (power driven),
together with the electric motors and power transmission equipment, to wit:
1–2-horsepower motor.
1–5-horsepower motor,
1–countershaft, with 4 pulleys and 2 hangers,
1–3½-inch belt,
1–4-inch belt,
2–Wells Norris motor starting switches.

The claim of the bankrupt in this regard is based on section 690, subdivision 4 of the Code of Civil Procedure of the State of California, which, taken with the introductory part of said provision of said law, reads as follows:

> The following property is exempt from execution . . . . 4. The tools or implements of a mechanic or artisan, necessary to carry on his trade.

It is the contention of the trustee herein, that the articles hereinbefore referred to do not fall within the category of "tools or implements," but, in fact, consist of "power machinery," and hence cannot be set apart to the bankrupt as exempt under the provisions of the statute under discussion. [11]

On behalf of the bankrupt, it is conceded that said personal property is power machinery. It is asserted, however, that since it is "necessary to carry on his trade," the section of the California law dealing with the "tools or implements of a mechanic or artisan" is broad enough to take in the articles in question and therefore the trustee should set them apart as exempt.

After a careful study of the authorities submitted by counsel on both sides, I am of the opinion that the bankrupt's contention cannot be upheld. In taking this position, I am not unmindful of the positive language used by the California Supreme Court In re McManus, 87 Cal. 292, at page 294, wherein it was said:

> Statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn support for himself and family. The general rule now is that such statutes are to be liberally construed, so as to effectuate the humane purpose designated by the lawmakers, and our Code of Civil Procedure declares that all of its provisions are to be so construed

"with a view to effect its objects and to promote justice." (Sec. 4.)

Nevertheless in determining exactly what articles are exempt, I take it that I am to be guided by the legislative intent as declared in the statute under discussion, and any decisions of the court, state or federal, which are interpretative thereof. I am well aware of the rule whereby I am bound to follow the dictates of the higher courts of California wherever they have construed the statute concerning exemptions, if there be any such decisions bearing upon the question. After an exhaustive research, however, I have been unable to find a single case where the California Supreme Court, or any of its Appellate Courts, has passed upon the subdivision of section 690 Code of Civil Procedure [12] in which the question as to whether or not "power machinery" would be included within the term "tools or implements" of a "mechanic" or "artisan."

Counsel for bankrupt is very insistent that In re Klemp, 119 Cal. 41, wherein a combined harvester was set apart as exempt, is determinative of the question herein involved, and consequently the objection that "power machinery" cannot be included within the category of "tools and implements" is not a valid objection *the* the setting apart of the said tools herein claimed by said bankrupt.

It is to be observed, however, that the last mentioned decision was not rendered as interpretative of subdivision 4 of section 690 Code of Civil Procedure, but simply is the declaration of the Cali-

fornia Supreme Court in placing a construction on subdivision 3 of said section, which taken with the introductory portion of said section reads as follows:

> "The following property is exempted from execution or attachment . . . . 3. The farming utensils or implements of husbandry of the judgment debtor . . . . "

In all candor, I admit, that had I no other means of guidance, in spite of the fact that the decision just referred to is not intended to construe the particular subdivision here under discussion, and involves an entirely different combination of terms, I would be very much inclined to accept said decision as the law of this case, and find in favor of the bankrupt. This I cannot do however, and for this reason:

The California Supreme Court determined In re Klemp, *supra,* on the 9th day of November, 1897. In 1899, the legislature added subdivision 17 to section 690, Code of Civil Procedure; so much thereof as is necessary to [13] illustrate the point here under discussion reads as follows:

> "All machinery, tools and implements necessary for boring . . . . wells . . . . "

Manifestly, in the legislative mind, there was a clear-cut distinction between the meaning of the words "machinery" and "tools and implements."

This being so, it necessarily follows that had the legislature intended that the "machinery" of a "mechanic" or "artisan" should come within the purview of the particular subdivision of the section

herein involved, it would have so declared in no uncertain terms, and having failed to do so, the word or words necessary to give the broad construction here *contained* for by the bankrupt should not be imported into the statute. In the use of the language just immediately foregoing, I have in mind the decision of Dooling, D. J., In the Matter of William Wilder, Bankrupt, 35 Am. Bank. Rep. 319, wherein it was held that a taxicab does not fall within the provisions of section 690 of the Code of Civil Procedure, holding as exempt certain vehicles of hackmen, etc., and wherein the learned Judge in passing upon the question there involved, said that

> " . . . . while those provisions are to be construed liberally, yet the court is not warranted in creating by interpretation new exemptions."

and also the further language used by James, J., in Crown Laundry & Cleaning Company (a Corporation) vs. G. E. Cameron, 39 Cal. App. Rep. 617, at pg. 618, wherein he said, in referring to exemptions:

> "For the courts to add to the Statute any articles *no* enumerated, would in effect be judicial legislat*ure.*"

It is therefore my opinion, that the hereinbefore [14] mentioned property is not exempt, and that the trustee herein, as such, is entitled thereto.

Dated: June 9th, 1927.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 9th, 1927, at 55 minutes past 4 o'clock P. M. [15]

[Title of Court and Cause.]

(MEMO OPINION AND ORDER RE REVIEW.)

The petition for review of the Referee's order *in re* exemptions is sustained, the order is reversed and the claim of exemption sustained and granted.

It is apparent that the tools or implements involved are what may be termed "one-man" tools or implements. That is, they are appropriate to use by one mechanic and generally so used, though power driven.

There is nothing in this remedial statute limiting the mechanic to hand tools, denying to him the benefit of development and improvement in his craft.

Were it a case of a shop filled with tools to each *employ* or require several men to operate, machinery and a machine-shop rather than tools and a mechanic's place of labor, the rule would be otherwise.

August 29, '27.

BOURQUIN, J.

[Endorsed]: Filed Aug. 30, 1927, at 10 o'clock and 10 min. A. M. [16]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO CERTAIN DOCUMENTS FOR USE ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 16 pages, numbered from 1 to 16, inclusive, contain a full, true and correct transcript of certain documents in the above-entitled matter as requested in praecipe of appellant on file herein, the originals of which are on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript is the sum of eight dollars and five cents ($8.05), and that the same has been paid by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of October, A. D. 1927.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [17]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of ROBERT E. SHEPHARD, Bankrupt.

W. E. DEAN, Trustee in Bankruptcy of the Estate of ROBERT E. SHEPHARD, a Bankrupt,

Petitioner,

vs.

ROBERT E. SHEPHARD, Bankrupt,

Respondent.

PETITION FOR ALLOWANCE OF APPEAL.

To the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, W. E. Dean, feeling aggrieved by the decision and order made in the above-entitled matter by the United States District Court for the Northern District of California, on August 29, 1927, and filed August 30, 1927, granting the bankrupt's petition for review and reversing that certain order of Burton J. Wyman, Esquire, Referee in Bankruptcy, in the above-entitled matter, made June 9, 1927, denying the bankrupt's claim of exemption to certain power machinery as tools and implements of a mechanic necessary to carry on his trade, and sustaining and granting the bankrupt's claim of exemption thereto,

Comes now by his undersigned attorney and petitions that a appeal be allowed from said order to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and, if said petitioner, as trustee in bankruptcy, is required to give bond, an order be made fixing the amount of said bond.

LAURENCE R. CHILCOTE,
Attorney for Petitioner.

Receipt of a copy is hereby admitted this 27th day of September, 1927.

W. E. RODE,
Attorney for Respondent.

ORDER ALLOWING APPEAL.

The foregoing appeal is hereby allowed this 27th day of September, 1927.

W. H. HUNT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Petition for Allowance of Appeal. Filed Sep. 28, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of ROBERT E. SHEPHARD, Bankrupt.

W. E. DEAN, Trustee in Bankruptcy of the Estate of ROBERT E. SHEPHARD, a Bankrupt,

Petitioner,

vs.

ROBERT E. SHEPHARD, Bankrupt,

Respondent.

ASSIGNMENTS OF ERROR.

Comes now W. E. Dean, the petitioner above named, and makes and files the following assignments of error upon which he will rely in the prosecution of his appeal in the above-entitled matter.

I.

That the United States District Court for the Northern District of California erred in making and entering its decision and order on August 29, 1927, reversing the order made June 9, 1927, by the Referee in Bankruptcy in the above-entitled matter, denying the bankrupt's claim of exemption to certain power machinery as tools or implements of a mechanic necessary to carry on his trade, and sustaining and granting the bankrupt's claim of exemption thereto.

II.

That said Court erred in finding said power machinery to be the tools or implements of a mechanic necessary to carry on his trade, in that said finding was against the weight of evidence and inconsistent with the agreed statement of facts.

III.

That said Court erred in law in granting the petition for review, reversing the Referee's order and making its order sustaining and granting the bankrupt's claim of exemption, for the reason that said power machinery does not come within the purview of subdivision 4 of section 690 of the Code of Civil Procedure of the State of California.

WHEREFORE, said petitioner prays that the said order of the above-entitled court made on August 29, 1927, be reversed, and that the said court be instructed to make and enter its order sustaining and confirming the said order made by the said Referee in Bankruptcy on June 9, 1927, and denying said power machinery as exempt.

LAURENCE R. CHILCOTE,
Attorney for Petitioner.

Receipt of copy of the within assignment of error is hereby admitted this 27th day of September, 1927.

W. E. RODE,
Attorney for Respondent.

[Endorsed]: Assignments of Error. Filed Sep 28, 1927. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Robert E. Shephard, a Bankrupt, and to W. E. Rode, His Attorney, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein W. E. Dean, Trustee in Bankruptcy of the Estate of Robert E. Shephard, a bankrupt, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Circuit, this 27th day of September, A. D. 1927.

WM. H. HUNT,
United States Circuit Judge.

United States of America,—ss.

On this 19th day of October, in the year of our Lord one thousand nine hundred and twenty-seven, personally appeared before me Laurence R. Chil-

cote, the subscriber, and makes oath that he delivered a true copy of the within citation to Walter E. Rode, attorney for appellee, at Oakland, California, on the 19th day of October, 1927.

LAURENCE R. CHILCOTE.

Subscribed and sworn to before me at San Francisco, this 21st day of October, A. D. 1927.

[Seal] FRANK H. SCHMID,
Deputy Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Citation on Appeal. Filed Oct. 22, 1927. F. D. Monckton, Clerk.

[Endorsed]: No. 5282. United States Circuit Court of Appeals for the Ninth Circuit. W. E. Dean, as Trustee in Bankruptcy of the Estate of Robert E. Shephard, a Bankrupt, Appellant, vs. Robert E. Shephard, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed October 18, 1927.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 5282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. DEAN, as Trustee in Bankruptcy of the Estate of Robert E. Shephard (a bankrupt),

Appellant,

vs.

ROBERT E. SHEPHARD,

Appellee.

BRIEF FOR APPELLANT.

LAURENCE R. CHILCOTE,
Builders Exchange Building, Oakland,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 5282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. DEAN, as Trustee in Bankruptcy of the Estate of Robert E. Shephard (a bankrupt),

Appellant,

vs.

ROBERT E. SHEPHARD,

Appellee.

BRIEF FOR APPELLANT.

I.

STATEMENT OF CASE.

This is an appeal from an order of Southern Division of the United States District Court for the Northern District of California, Bourquin, J., sustaining the Bankrupt's petition for review and reversing the Referee's order requiring the Bankrupt to turn over to the Trustee certain power machinery which the Bankrupt claimed as exempt.

The question involved is an interpretation of the Exemption Statute as found in Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California.

II.

SPECIFICATION OF ERRORS.

That the decree of the court made and entered is erroneous in reversing the Referee's turn-over order and granting the Bankrupt an exemption to certain *power machinery,* for the following reasons:

A. That said *power machinery* does not come within the purview of Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California, and therefore cannot be set aside as exempt.

B. That conceding that said power machinery *may* come within the limitations of the section of the Code, to-wit: *"Tools or Implements of a Mechanic or Artisan,"* the weight of evidence is that said power machinery was *not necessary* to carry on his trade.

III.

STATEMENT OF FACTS.

The facts are not in dispute.

The Bankrupt claims to be an automobile body and top maker. At the time of filing his petition in bankruptcy he had no one working for him, he normally employed two or three men, but during the period between June 1 and September 1, 1926, which the evidence showed to be the best months of his business history, he had four men working for him.

In his schedule, the Bankrupt listed certain tools, implements, *equipment and power machinery,* all of which he claimed as exempt. The Trustee made his report on exemptions and the Referee made his order (pp. 3-5):

1. Allowing *as exempt* all "tools or implements" to which the Bankrupt was unquestionably entitled and including,

(a) Blacksmith forge, anvil and hand tools;

(b) Hand tools and implements for acetylene welding;

(c) Hand wood working tools;

(d) Machinist's hand tools;

(e) Curtain and upholstery maker's tools, including a sewing machine (originally operated by foot power, and to which a small electric motor had been attached);

(f) A portable electric power drill.

Said "tools or implements" being sufficient to enable the Bankrupt to carry on five separate and distinct trades; and,

2. Denying Bankrupt's claim of *exemption* to certain *power machinery,* a general description of which is as follows (pp. 4-5):

1 36-inch band saw (power driven);
1 12-inch joiner (power driven);
1 ½-inch post drill (power driven);
1 Emery wheel (power driven).

Together with the electric motors and power transmission equipment, to-wit:

1 2-horsepower motor;
1 5-horsepower motor;
1 Countershaft, with 4 pulleys and 2 hangers;
1 3½-inch belt;
1 4-inch belt;
2 Wells Norris motor starting switches.

The Bankrupt petitioned the District Court for a review of that part of the Referee's order dealing with the *power machinery,* paragraph (2) above, and the District Court, on the hearing, reversed the said Referee's turn-over order and granted the Bankrupt's claim of exemption to said power machinery.

IV.

ARGUMENT.

A. THAT SAID POWER MACHINERY DOES NOT COME WITHIN THE PURVIEW OF THE EXEMPTION STATUTE.

1. Exemptions Determined by State Statutes.

In

Vought v. Kanne (C. C. A. 8th Cir.), 10 F. (2nd) 747,

the court said:

> "Exemptions in bankruptcy proceedings depend upon and are the same as those allowed by the governing state statutes as construed by the highest court of the state."

See also:

Ralph v. Cox (C. C. A. 8th Cir.), 1 F. (2nd) 435.

2. Exemption Statute of State of California.

Then, said *power machinery* to be exempt must come within the purview of Subdivision 4 of Section 690 of the Code of Civil Procedure of the State of California, which, taken with the introductory part of the provision of said law, reads as follows:

> "The following property is exempt from execution * * * 4. The tools or implements of

a mechanic or artisan, necessary to carry on his trade."

From a consideration of the statutes it is apparent that said *power machinery* must satisfy two qualifications in order to be exempt:

First, it must come within the limitation of *"tools or implements"* of a mechanic;

Second, it must be *necessary* to carry on his trade.

THE CLAUSE "TOOLS OR IMPLEMENTS" IS TOO LIMITED IN SCOPE TO EMBRACE POWER MACHINERY.

1. Limits of clause "tools or implements" as determined from texts and definitions:

Thompson on Homesteads and Exemptions, Section 755:

"Statutes exempting under various phraseology, the necessary tools of a debtor, by which he carries on his trade or occupation have never been held to embrace complicated and expensive machinery. The word 'tool' as used in such statutes, is understood to refer to some *simple instrument used by hand,* such as a saw, a plane, a trowel, and the like. The design of these statutes is said to be fulfilled by protecting mechanics and other laborers with the *usual implements necessary* in the exercise of their appropriate callings; and this benevolent design would be grossly perverted by extending it to large and expensive machines, or to separate machines, instruments and materials used in large manufacturing establishments, requiring the cooperation of many hands."

Freeman on Executions, Section 226, page 1212:

"That a machine may be exempt from execution as a tool or implement of the trade of the

debtor, must now be admitted. The difficulty is in formulating some test by which to determine when it is exempt and when not. The earlier cases incline to suggest the simplicity of its construction as such test. This is worthy of consideration but cannot be accepted as a final or conclusive test. Perhaps the capacity of the debtor to use it by his own personal strength or skill, without the aid or assistance of other machinery or motive power, is a better test. To illustrate: a typewriter or a sewing machine is by no means simple in its construction, but it may be used by an operative through the exercise of his personal strength and skill, and may be the one tool by which he carries on his trade or vocation, and earns his livelihood. If so, it is exempt from execution. The same rule is applicable to a lathe and its appliances necessary to enable the defendant to carry on his business as a mechanic, if it is run by *one-man power,* and is a tool ordinarily and necessarily used by mechanics and machinists in their trade." (Cites *Robb* case, 99 Cal. 202; 33 Pac. 890.)

25 *Cor. Jur.* 49:

"Tools are simple instruments used by hand and do not embrace extensive and complicated machines and appliances."

"To be exempt as a 'tool' the machine must be operated by hand and not by steam or water power, and even where statutes exempt 'tools and apparatus', tools have been construed to apply to simple instruments and apparatus and to machinery in some instances of considerable power and weight, but in both cases they must be *worked by hand or muscular power to be exempt.*"

18 *Cyc.* 1417:

" 'Tools', in its general received sense, has been stated to imply 'instruments of small value, and used with the direct application of *manual* strength'."

That the Circuit Court has approved the foregoing interpretation and limited the scope of the phrase "tools or implements" is shown in

Peyton v. Farmers National etc. Bank, 261 Fed. 326 (1919),

where the Circuit Court for the 5th Circuit, in deciding this case involving mill machinery *propelled by an electric motor,* said:

> "Machinery may not be set aside to a bankrupt as tools or apparatus of trade, where run by *other than hand.*" (Cites *Thompson on Executions* and two Texas cases, (a) *Willis v. Norris,* 66 Tex. 628; (b) *Cullers v. Jones,* 66 Tex. 494.)

ONLY SUCH ARTICLES ARE EXEMPT AS WERE WITHIN THE INTENT OF THE LEGISLATURE AT THE TIME OF THE CREATION OF THE EXEMPTION STATUTE.

In

Conlin v. Traeger, 52 C. A. D. 1206, 258 Pac. 433,

decided by the District Court of Appeal on August 5, 1927, and a hearing denied by the Supreme Court, October 3, 1927, we find the following language:

> "While the statute should be liberally construed, it has been held that construction should not be indulged in to the extent of conferring privileges and benefits by construction which were *not intended to be conferred by the Legislature,* or to the extent of doing violence to the terms of the statute. So, where a specified article of personal property is made exempt, the courts are not authorized to extend the exemption by construction to *any other or different article.* Kennedy v. Hills (C. C. A.), 233 F. 666. As the automobile is an invention *which was not in use* when the statute was passed, it, of course, was

not mentioned therein, and was not within the *intent of the Legislature;* and as the Legislature has been in session many times since the automobile came into common use, and has not seen fit to include it in the statute as exempt from attachment or execution, when used by a physician in the practice of his profession, we must hold that it does not come within the provisions of the statute, and is therefore not exempt."

The above case also quoted from

Estate of Brown, 123 Cal. 399:

"Exemptions are the creations of statutes and exceptions to the general rule. No property is exempt *unless* made so by *express* provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that *other property not in the list of exemptions* should be added thereto. * * * And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save *what is expressly made so,* and when a statute gives a list of exempt property it expressly provides that *no other property is exempt.* To construe an unambiguous statute is an attempt to defeat the expressed legislative will and not to ascertain it. * * * It is said that the statute is remedial and should be liberally construed to effect the purpose of the Legislature. That is so; but that is not a liberal construction, which defeats the plainly expressed purpose of the Legislature."

The *Conlin* case also quoted from other authorities, in

Stanton v. French, 91 Cal. 276:

"In the list of property allowed peddlers by statute as exempt from execution, we find no

article answering in name or use to a breadbox, and a *debtor's claims are limited by the words of the statute.* (Italics ours.)"

In

Crown Laundry etc. Co. v. Cameron, 39 Cal. App. 617, 179 Pac. 525,

the court said:

"Clearly it appears to us that a motor driven vehicle is not a cart, wagon, dray, truck, coupe, hack, or carriage, as those terms are used in the section * * * If the Legislature intended that a motor vehicle should be exempt from attachment, we think that it would have so declared in plain terms. For the courts to add to the statute any articles not enumerated would in effect be *judicial legislation.*"

The same question was raised in

In re Wilder (D. C.), 221 Fed. 476.

There the bankrupt claimed as exempt under Section 690 of the Code of Civil Procedure a taxicab automobile. The court, Dooling, D. J., says:

"This taxicab does not fall within the *literal* terms of the section and while those provisions are to be construed liberally, yet the court is not warranted in *creating by interpretation* new exemptions. The Legislature of this state has been in session several times since taxicabs have been in very general use, and might well have included them in the exempt list. As the Legislature has not done so, I do not feel warranted in doing so by an interpretation of the language of the section which at the best would be a forced one."

AT THE TIME SUBDIVISION 4 OF SECTION 690 WAS ENACTED, IT WAS NOT WITHIN THE INTENT OF THE LEGISLATURE TO EXEMPT POWER MACHINERY, ELECTRIC MOTORS, TRANSMISSION MACHINERY, ETC.

We find in the Compiled Laws of California, 1850-1853, as much of Subdivision 4 of Section 690, therein called Subdivision 4 of Section 219, as we are here concerned with.

It is of general knowledge that electric motors and power machinery have been developed well within the past forty years. Francis B. Crocker, professor of electrical engineering at Columbia University, in his book, "Electric Motors", at page 2, says that it was not until after 1887, when the Central Stations and Power Companies had developed their electric power distribution systems to the point where they became sufficiently large and well regulated that the use of the electric motor was encouraged. This court can take judicial notice that seventy-five years ago, and a long time prior to the invention, practical application or general use of electric motors and power machinery, that it was *not the intent of the Legislature* to exempt said motors and power machinery of which it knew nothing.

Further, that the Legislature fully appreciated the narrow scope, effect, interpretation and limits of the phrase "tools or implements" is shown by the wording of Subdivision 17 of Section 690 which was added in 1899 and which reads:

> "The following property is exempt from execution * * * 17. *All machinery,* tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells; also the *engines* necessary for operating

> such machinery, implements, tools, etc., also all *trucks* necessary for the transportation of such machinery, tools, implements, engines, etc.; provided, that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars."

It will be noted, first, that the word *machinery* has been added to the phrase "tools and implements"; second, that the Legislature realized that even the new term machinery, which they had added, did not include the means of propelling said machinery, the motive power, the engines, etc., as they specifically added the phrase "also the engines necessary for operating said machinery, implements, tools, etc."; and, third, the Legislature further placed a limitation of one thousand dollars on the articles which might thereunder be claimed as exempt.

As the learned Referee has very clearly stated (p. 15, Transcript):

> "Manifestly, in the legislative mind, there was a clear-cut distinction between the meaning of the words *'machinery'* and *'tools and implements'*.
>
> "This being so, it necessarily follows that had the Legislature intended that the *'machinery'* of a 'mechanic' or 'artisan' should come within the purview of the particular subdivision of the section herein involved, it would have so declared in no uncertain terms, and having failed to do so, the word or words necessary to give the broad construction here contended for by the Bankrupt should not be imported into the statute."

THE SUPREME COURT OF CALIFORNIA HAS CONSIDERED ONLY TWO "MACHINERY CASES" UNDER SUBDIVISION 4 OF SECTION 690, IN ONE, A MANUALLY OPERATED TOOL WAS HELD TO BE EXEMPT, AND IN THE OTHER, POWER OPERATED MACHINERY WAS HELD NOT TO BE EXEMPT.

In re Robb, 99 Cal. 202 (1893),

a case involving a *manually operated* machinists' lathe, the court said:

> "The implement in question, according to the testimony of the claimant, was necessary to carry on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about $250, *was run by man power,*—one man easily turning it,—and was a tool ordinarily and necessarily used by mechanics and machinists in their trade."

and affirmed the order setting said tool aside as exempt.

In the second case, however, the court not only denied exemption of *power operated machinery,* but also of other tools or implements which the court found *were not necessary:*

In re Mitchell, 102 Cal. 534 (1894),

where the court said:

> "The sole question then is, *was the property exempt from execution?* The property consisted of four printing presses, a miscellaneous assortment of type, a paper-cutting machine, chases, rules, leads and the general paraphernalia of a printing office. Three of the presses were *operated by steam,* and the machinery was run by shafts, belts, and pulleys. There was also an iron safe, which cost $100, and the total cost of the plant was $3500. Mitchell was not himself a practical printer, typesetter, pressman or machinist, but he was the manager of the printing establishment, and employed a foreman, and

sometimes a dozen typesetters and machinists, the number depending upon the amount of work on hand. He testified that 'every bit of the material, machinery, type, etc., which I sold * * * was absolutely necessary to the business which I was carrying on'. On the other hand, N. C. Hawks testified that he had been a practical printer for 18 years, and that a printer could get along and make a living with one press and $500 or $600 worth of type. The statute declares that 'the tools or implements of a mechanic or artisan necessary to carry on his trade' are exempt from execution. Code Civ. Proc., Section 690, Subd. 4. *Conceding* that Mitchell was a mechanic or artisan, within the meaning of this section, and that the *printing presses operated by steam, paper-cutting machine,* etc., *may* be regarded as the tools or implements of a printer, still the statute exempted *only* such tools or implements as were *necessary* to carry on his trade, and *not all* that he may have acquired and used in his business."

The jury found that none of the machinery, tools or implements were exempt, and the court held that they could not disturb the verdict for want of evidence to support it.

ASSUMING, FOR ARGUMENT, THAT SAID POWER MACHINERY MAY COME WITHIN THE LIMITATION OF "TOOLS OR IMPLEMENTS", STILL IN ORDER TO BE EXEMPT, IT MUST BE "NECESSARY TO CARRY ON HIS TRADE".

The court, with reference to the various provisions of Section 690, said:

Estate of Millington, 63 Cal. App. 498:

"There appears therein a general purpose to limit the various articles exempted, either by number or value or by the word 'necessary' or other equivalent expression."

It will be recalled that the *Mitchell* case, above quoted, clearly stated that even "tools or implements" and only those "necessary to carry on his trade and not all that he may have acquired and used in his business" are exempt.

SUMMARY OF THE EVIDENCE WHICH SUPPORTS THE RULING THAT SAID POWER MACHINERY WAS NOT NECESSARY TO CARRY ON HIS TRADE.

From the agreed statement of facts (pp. 8-11, Transcript) we find "that a journeyman auto body mechanic, when working for another, is not required to furnish such band saw, joiner, drill or emery wheel, but that the same are usually furnished by the establishment for which he works".

The job record introduced in evidence showed that the jobs performed during the months of June, July, and August, 1926, the best months of the Bankrupt's business history, were those of repairing side curtains, putting in new celluloids, repairing fenders, straightening fenders, etc., jobs which both the Bankrupt and his expert witness, who had been employed by the Bankrupt for some time and who was familiar with the work performed in the shop, testified *did not require the use of the power machinery* with which we are here concerned. Further, the Bankrupt was unable to pick out more than one job performed in the three-month period which would require the use of the power machinery, and even as to that job it was not shown that said power machinery was necessary.

CONCLUSION.

Referring to the memo opinion and order of the learned District Judge Bourquin, wherein he says:

> "There is nothing in this remedial statute limiting the mechanic to hand tools, denying to him the benefit of development and improvement in his craft."

we infer from his language that he appreciated that said power machinery did not come squarely within the limitation of "tools or implements", but that, notwithstanding that fact, he felt that the Bankrupt should still be entitled to the benefits of the development and improvement of the tools of his craft. Be that as it may, still, we feel that is a matter for legislative consideration, and a grant of exemption by them, rather than a case where the original intent of the Legislature should be enlarged or extended by judicial decision.

As we have seen, the highest court of our state has declined to give a physician in *Conlin v. Traeger,* supra; or a baker in *Stanton v. French,* supra; or a laundryman in *Crown etc. Co. v. Cameron,* supra; or a hackman in *In re Wilder,* supra, the benefit of the improvement of science, invention and mechanical progress, and substitute an automobile, and it will be conceded by all that the automobile is now as necessary to enable each to make a livelihood as was the horse and wagon which the automobile has replaced, then, by the same token, we feel that the original legislative intent to exempt *only manually operated tools or implements* should not be enlarged, by judicial legislation, to give a mechanic or artisan the benefit

of science, invention and mechanical progress, and grant an exemption of *power operated modern machinery,* which the Legislature, at the time it enacted the exemption statute in 1850, could not have had in mind nor *intended* to exempt.

It is respectfully but earnestly submitted that upon the facts and under the law, the judgment of the District Court should be reversed, and the Referee's turn-over order affirmed.

Dated, Oakland,
February 20, 1928.

LAURENCE R. CHILCOTE,
Attorney for Appellant.

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No. 5282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. DEAN, as Trustee in Bankruptcy of the Estate of Robert E. Shephard (a Bankrupt),

Appellant,

vs.

ROBERT E. SHEPHARD (a Bankrupt),

Appellee.

BRIEF FOR APPELLEE.

W. E. RODE,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

I.

Appellant's statement of facts is quite incomplete and by way of supplementing same we therefore quote as follows from the agreed statement of facts (Tr. pages 8 to 11), to wit:

> "That the bankrupt was and is an auto-body mechanic and had followed that trade exclusively and continuously for more than fifteen years last past and up to the present time; that at the time of filing his petition—and for some four months previously he was carrying on his trade by himself alone and had no other mechanics or men working for him;
>
> That at the time of filing his petition in bankruptcy the bankrupt was using in his said trade

and claimed as exempt the following tools and implements, to wit:

1 12″ joiner with 2 HP. direct drive motor attached.

1 36″ band saw connected up with ½″ post drill and an emery wheel and driven by a 5 HP. motor.

and the following transmission equipment:

1 countershaft with 4 pulleys and 2 hangers, 1 3½″ belt, ¼″ belt, 1-2″ belt, 2 Wells-Norris motor starting switches.

That the bankrupt could not carry on his trade as an auto-body mechanic under present day conditions without the use of said implements driven by electric motors—that such (implements) bandsaw, joiner, drill and emery wheel with said motors to drive are part of the ordinary equipment of an auto-body mechanic who carries on his trade as such and is the *minimum* equipment with which an auto-body mechanic can successfully carry on his trade; that without said equipment an auto-body mechanic cannot carry on said trade for himself.

That the bankrupt—at no time has been a manufacturer of auto-bodies but that his work as auto-body mechanic has been confined to the rebuilding and repairing of auto and commercial bodies and the occasional making of commercial bodies—on special orders—as a jobbing shop."

By a clever play and repetition of the words "power machinery" and "power driven" appellant has studiously sought to convey the impression that the implements involved here were complicated and heavy machinery and required expensive motors of larger power to operate the same. I believe the expression "power machinery" and "power driven" occurs some 40 times in the course of appellant's short brief. This

argument is ridiculous considered in the light of the facts that this so-called "power machinery" consisted solely of one 2 HP. and one 5 HP. electric motor. I presume appellant would designate the ordinary household electric washing machine or vacuum sweeper as "power machinery". Under the agreed statement of facts the testimony is positive and unequivocal that the tools and implements claimed as exempt are *"the minimum equipment with which an auto-body mechanic can successfully carry on his trade; that without said equipment an auto-body mechanic cannot carry on that trade for himself"* which facts bring the case clearly within the provisions of Sub. 4, Sec. 690 C. C. P. which exempts "the tools or implements of a mechanic or artisan necessary to carry on his trade".

II.

The argument of appellant seems to be first, that inasmuch as electric motors for commercial use had not been invented at the time of the adoption of Sec. 690 C. C. P., therefore electrically driven implements are in no case exempt, no matter how necessary they might be as implements of a mechanic. And second, that the items referred to cannot be considered as implements of trade.

1st. As far as the first point is concerned, the argument is entirely fallacious. If that point were true, then in no case could any tools of any auto-mechanic be exempt because automobiles and auto-mechanics did not exist when Sec. 690 was enacted. It is true that in *Conlin v. Traeger,* 53 C. A. D. 1206 the Court

refused to sustain the exemption claimed by a physician of his automobile but this ruling was under the peculiar phraseology of Sec. 690 C. C. P. 6, which exempts "one horse with vehicle and harness or other equipment used by a physician in the legitimate practice of his profession". Manifestly an automobile could not by any stretch of imagination be classified as "one horse with vehicle".

2nd. It remains only to consider whether the bandsaw and planer, etc., with the motors to run them are "necessary" and whether they are "implements" within the meaning of Sec. 690, Sub. 4.

See *In re Millington,* 63 Cal. App. 498,

Where the Court in speaking of "Necessary wearing apparel" as that term is used in our exemption law says:

> "Of course, the word 'Necessary' does not limit wearing apparel to that which is *indispensable,* but it is sufficiently flexible to include things which are usual appropriate for the reasonable comfort and convenience of a debtor, although they may not be absolutely necessary for mere subsistence. (Freeman on Executions, 3d ed., sec. 232; Leavitt v. Metcalf, 2 Vt. 342 (19 Am. Dec. 718); Sellers v. Bell, 94 Fed. 801 (36 C. C. A. 502).)"

The testimony in the case at bar shows that the tools and implements referred to were not merely "usual and appropriate" for the debtor's use in carrying on his trade but that they were really indispensably necessary.

We would infer that appellant contends that inasmuch as a journeyman auto-mechanic is not required to supply the tools he works with, therefore they are

in no case exempt. But the contrary has always been held in this state.

13 *Cal. Jur.* "Exemption", Sec. 3, p. 334.

> "The law does not require that a mechanic shall be employed as a journeyman in order to be entitled to the exemption. He is as clearly a mechanic who owns a tool, and uses it himself in the manufacture of articles, as is a journeyman who works in an establishment and has such tools supplied by the manufacturer. And a tool or implement will not be held to be unnecessary merely because some journeyman machinist can get employment with a manufacturer who will supply the implement".

s. c. *In re Robb,* 99 Cal. 202.

Where the question was involved whether a lathe and certain appliances used by a machinist in running it were exempt, and the Court held it was exempt, stating:

> "It is contended that a lathe is not a tool or implement required by a mechanic, and evidence was given to the effect *that a journeyman machinist when working for others is not usually required to provide an implement of that character.* This evidence tended simply to show that such a tool or implement is not necessary for a mechanic who is a machinist while employed as a journeyman, but the law does not require that a mechanic shall be employed as a journeyman in order to be entitled to the exemption. Nor is the phrase 'necessary to carry on his trade' used in such strict sense that because some journeyman machinist *can* get employment with a manufacturer who will supply the implement, therefore it is not necessary to the trade within the meaning of the statute.
>
> The implement in question, according to the testimony of the claimant, was necessary to carry

> on his business as a mechanic and machinist, and is a tool used for shaping wood or metal, cost about two hundred and fifty dollars, was run by manpower, one man easily turning it, and was a tool ordinarily and necessarily used by mechanics and machinists in their trade."

s. c. *In re Petersen,* 95 Federal 417,

Decided by the late Judge DeHaven where it was held that the miscellaneous equipment of a baker consisting of pans, peals, molds, bread boxes, benches, dough mixers, knives, sieve, ornamenting tools, bread scales, and scrapers used and to be used by the bankrupt and his employees were exempt, the Court quoted with approval from *In re Robb,* infra and held

> "So, also, under the statute of this state (California), the tools and implements which may be properly claimed by an artisan as necessary in carrying on his trade, are not in all cases limited to such only as he *personally* uses while so engaged, but may include tools and implements *used by others* whom it is reasonably necessary for him to employ to assist him in his work, in order that the same may be prosecuted conveniently, and in the usual or ordinary way in which the business of such trade is conducted."

It is not the law that the exemption is limited to hand tools and implements.

See *Reeves v. Basque,* 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77, where

It was held, under a statute exempting "tools, implements—of any mechanic—used and kept for the purpose of carrying on his trade and business" (which is substantially like the California statute) that a traction engine and saw mill were exempt, and similarly in

> *Woods v. Bresnahan,* 63 Mich. 614, 30 N. W. 206,

A shingle machine, steam engine and flywheel and a saw gummer were exempt under a similar statute.

The word "implements" used in our statute is not synonymous with the word "tools", but has a wider meaning.

See 12 *Cal. Jur.* "Exemptions", page 334, where it is stated

> "The statute exempts from execution or attachment, 'the tools or implements of a mechanic or artisan, necessary to carry on his trade'. The words 'tools' and 'implements' herein used are not synonymous, the latter being the broader term. It is difficult to define accurately the word 'implements' and the courts seem never to have attempted it. It has been held, however, that the word is broad enough to 'include a jeweler's safe owned and used in the business of a jeweler and watch repairer.' citing
>
> *In re McManus,* 87 Cal. 292.

The word "implements" also occurs in the exemption of the farmers (though the word "necessary" is not there found and the value is limited to $1000.00), and under that statute it was held in

Estate of Klemp, 119 Cal. 41, that a

Combined harvester used by the debtor on his own farm and occasionally for outside work was an *implement* of husbandry, the Court stating:

> "Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rake, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement used

with less effectiveness for the same purpose. *Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery.*"

s. c. *Spence v. Smith,* 121 Cal. 536,

When a threshing outfit worth $460.00 was held exempt even though the debtor usually used it for hire to thresh the crops of others after doing his own work.

It is doubtless true that in some jurisdictions the words "tools and implements" are given a restricted meaning and are limited to hand-tools and hand-or-foot-operated machinery and appellant quotes from *Freeman on Executions,* p. 1212 to that effect. But that same author says on page 1218

> "So far as we are aware, none of the Courts have undertaken to define the word 'implements' as used in these statutes. The lexicographers define it as 'whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war'; and a utensil they declare to be 'that which is used; an instrument, an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business'. By the Courts, these words are accorded a broad signification, and exempt many things which are not tools. Thus, statutes exempting implements or utensils have been adjudged to exempt a printing press, type, and other articles, used in publishing a newspaper."

and again on page 1220 says:

> "In fact, there seems to be no limitation of the things which may be held exempt as implements, save that of necessity. If they are necessary in the debtor's trade or calling, they are exempt, though they are not mere tools, but are complicated and expensive machinery."

California has clearly placed herself in line with the more liberal and humane rule set forth in

25 *C. J.* "Exemptions", p. 50, as follows:

> "In other jurisdictions the terms 'apparatus', and even 'implements', have been construed more broadly to exempt machines driven by electricity, steam, or water, where it is shown that they are necessary to the debtor in conducting his business. In these jurisdictions exemptions are extended to an electric motor and lathe, and in several of the western states to portable steam engines and machinery for sawing logs and making lumber, the courts basing their decision in the latter group of cases on the fact that the lumberman debtor and owner uses the machinery in person and performs a considerable portion of the work himself, and that without such machinery the business of a lumberman cannot be carried on."

It is therefore respectfully submitted that the exemption claimed should be allowed, and the order made by the District Court affirmed.

Dated, Oakland,
March 19, 1928.

W. E. Rode,
Attorney for Appellee.